CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1985

HEARING

BEFORE THE

SUBCOMMITTEE ON
LABOR-MANAGEMENT RELATIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 281

HEARING HELD IN WASHINGTON, DC, MAY 21, 1985

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CONSTRUCTION INDUSTRY LABOR LAW AMENDMENTS OF 1985

TUESDAY MAY 21, 1985

House of Representatives,
Committee on Education and Labor,
Subcommittee on Labor-Management Relations,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2261, Rayburn House Office Building, Hon. William L. (Bill) Clay (chairman of the subcommittee) presiding.

Mr. Clay. The subcommittee will come to order.

Today, we continue our consideration of the critical problems affecting labor relations in the construction industry.

In March 1983, and again in September 1983, this subcommittee conducted oversight hearings concerning developments in labor law affecting the construction industry. The hearings focused on the spread of double-breasting and the weakening of prehire agreements.

Bipartisan legislation has now been introduced that addresses these growing problems.

Today, we move from oversight to an important first step in eliminating the unfair labor practices that have increasingly undermined the rights of workers in the construction industry.

H.R. 281 and its predecessor in the last Congress, H.R. 6043, are an attempt to restore basic fairness to labor relations in the construction industry. To date, 113 Democratic and Republican Members of Congress are cosponsors of H.R. 281 and we expect more.

The large number of cosponsors reflects a recognition that the problem is getting out of hand and the solution proposed by H.R. 281 is a reasonable one. In recent memory, there has been no bill concerning labor relations that has attracted such broad support.

Our labor laws are intended to guarantee workers who wish to join a union and engage in collective bargaining the opportunity to do so. Once the union and the employer enter in an agreement, both should be bound to live up to that agreement.

Such is not the case in the construction industry today, largely due to recent National Labor Relations Board and court decisions that have seriously eroded the binding effect of collective-bargaining agreements in this industry.

Double-breasting allows a contractor who has signed a bargaining agreement to establish a second nonunion operation with no practical difference from the original, except that it is not covered by the contract.

In addition, recent legal interpretations allow contractors to ignore otherwise binding contracts unless the union workers can meet difficult legal burdens. One way or another, construction workers find they have no effective way of protecting their basic rights to collective bargaining.

The seriousness of the problem and the broad cosponsorship of H.R. 281 suggests it is a bill that will receive serious consideration in this Congress.

H.R. 281 is at the top of this subcommittee's legislative agenda, and I intend to do all I can to see that it is enacted in this Congress. I am hopeful that today's hearing will bring us a step closer to that goal.

[Text of H.R. 281 follows:]

99TH CONGRESS
1ST SESSION

H. R. 281

To amend the National Labor Relations Act to increase the stability of collective bargaining in the building and construction industry.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1985

Mr. CLAY introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the National Labor Relations Act to increase the stability of collective bargaining in the building and construction industry.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be referred to as the "Construction Industry Labor Law Amendments of 1985".

SEC. 2. (a) Section 2(2) of the National Labor Relations Act (29 U.S.C. 151(2)) is amended by adding at the end thereof the following new sentence: "In the construction industry, any two or more business entities performing or otherwise conducting or supervising the same or similar work, in the same or in different geographical areas, and having any direct or indirect common ownership, management or control, shall be deemed a single employer.".

(b) Section 8(d) of such Act (29 U.S.C. 158(d)) is amended by adding at the end thereof the following new sentence:

"Whenever the collective bargaining involves employees of a business entity comprising part of a single employer in the construction industry, as defined in section 2(2) of this Act, the duty to bargain collectively, for the purposes of this section, shall include the duty to apply the terms of a collective bargaining agreement between such business entity and a labor organization to all other business entities comprising the single employer within the geographical area covered by the agreement.".

(c) Section 8(f) of such Act (29 U.S.C. 158(f)) is amended—

(1) by striking out "geographical area:" in clause (4) and inserting in lieu thereof the following: "geographic area. An agreement lawfully made pursuant to this subsection shall impose the same obligations under this Act as an agreement made with a majority representative pursuant to section 9(a):"; and

(2) by inserting before the period at the end of such section and the following new proviso: ": *Provided further,* That any agreement lawfully made pursuant

to this subsection may be repudiated only after the Board certifies the results of an election conducted pursuant to section 9(c), in which a majority of employees in an appropriate bargaining unit selects a bargaining representative other than the labor organization with which such agreement was made or chooses not to be represented by a labor organization".

Mr. CLAY. Mrs. Roukema.

Mrs. ROUKEMA. Thank you, Mr. Chairman.

I do not have a prepared opening statement, but indeed, I am happy that the original conflict I had has been resolved, and I can be here at the beginning of these hearings.

I was here, was it last year, Mr. Chairman, when we had the first hearings—or 2 years ago?

Mr. CLAY. Two years ago.

Mrs. ROUKEMA. I remember Mr. Georgine testifying at that time. I am not a cosponsor of this bill, but I would be happy to hear and listen with an open mind as to any new information that we have, and the arguments which will be presented.

The bill has grave problems, as far as I am concerned, but we shall listen with interest today to the arguments of the labor union representatives.

Thank you.

Mr. CLAY. Our first witness today is Mr. Robert Georgine, president, Building and Construction Trades Department, AFL-CIO. Without objection, your entire statement will be included in the record. You may proceed as you desire.

STATEMENT OF ROBERT GEORGINE, PRESIDENT, BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ACCOMPANIED BY LAURENCE COHEN AND LEO LEFERETTI

Mr. GEORGINE. Thank you, Mr. Chairman.

I want to thank the committee for the opportunity to appear in support of H.R. 281, which we view as essential to assuring the stability of labor relations in the building and construction industry.

The Building and Construction Trades Department is comprised of 15 national and international unions which in the aggregate represent a membership in excess of 4 million workers.

We are, therefore, vitally concerned with the need to preserve stable relations in the construction industry, in order to serve the needs of employers, employees, and the public as well.

In March 1983, I appeared before this committee to present the views of the Department and its constituent unions and their members on the failure of the National Labor Relations Board to enforce certain provisions of the National Labor Relations Act in the manner which Congress intended, and in a manner which jeopardized the stability of labor relations in this vital industry.

At that time, we did not seek amendments to the statute. The purpose then was to call attention to the failure of the Board properly to apply the act as it was then written. I stated to this committee that we merely sought that which Congress gave us in 1959, but which the NLRB had since undermined.

Unfortunately, the conditions which I addressed in 1983 have become even more serious today, and I believe that the time has come when the only answer lies in legislation. Indeed, as this committee knows, as a result of its hearings last summer and its subsequent report, entitled, "The Failure of Labor Law—A Betrayal of American Workers," the direction of the NLRB is getting worse and not better.

If we are to achieve justice, and if the original intent of Congress a quarter of a century ago is to be effectuated, the solution lies in legislation.

Today, under the Board's view of prehire agreements, an employer is, in many circumstances, free to repudiate a prehire agreement of any duration and the union is powerless to enforce the agreement unless it can prove that, at some previous time, it had established majority support among a stable complement of the employer's workers.

You do not have to be a legal scholar to know that a rule which lets one party to a contract repudiate his agreement at will is wrong and unfair.

After an employer repudiates a prehire agreement, he may then proceed to hire nonunion employees. He thus assures that the union is precluded from establishing majority support, while the union's real majority support, the workers who have relied upon the employer's prehire agreement commitments, languish on the out-of-work list at the hiring hall.

This result, in our view, is not only wrong, but nonsensical.

H.R. 281 would reverse the effects of this erroneous NLRB interpretation and would elevate 8(f) prehire agreements to the same status as full section 9(a) collective-bargaining agreements. In other words, they would remain fully enforceable until and unless the workers voted to reject their union.

The stability which Congress intended in 1959, by expressly validating prehire agreements, would thus be achieved, while at the same time, guaranteeing employees full protection of the choice of a bargaining representative through the use of the Board's election procedures whenever they wish.

Let us assume for the sake of argument that a union can prevent an employer in the construction industry from repudiating an ongoing prehire agreement. The NLRB has provided this reluctant employer with another opportunity to avoid his collective-bargaining obligations and to deny workers the benefits of union representation.

The NLRB has allowed employers to avoid these obligations by permitting them to establish double-breasted operations.

Double-breasted operations are a phenomenon unique to the construction industry. Although we cannot identify who coined the term "double-breasted" to identify these types of construction operations, it refers to a union construction company and a nonunion construction company, both of which are commonly owned and controlled.

A dozen years ago, the term was virtually unheard of. Today, it has become an easy way for employers to avoid their obligation to abide by collective-bargaining agreements.

We believe that the law should not permit employers to avoid collective-bargaining contracts by playing corporate shell games. Certainly, we are not saying that corporations should be denied the ability to form subsidiaries, but we are saying that when subsidiaries are formed to perform the exact same work of a unionized subsidiary, only on a nonunion basis, then the company violates the law in refusing to apply the collective-bargaining agreement to both operations.

We of the building trades are sympathetic to the need of our employers to remain competitive, and I am proud of the record of the building trades over the last decade in actively pursuing the elimination of noncompetitive work practices at the bargaining table.

In our view, however, the National Labor Relations Act dictates that the workers and employers must together negotiate solutions to noncompetitive aspects of collective-bargaining agreements and prohibits employers from unilaterally solving such problems through a decision to become double-breasted.

We believe that we are entitled to the opportunity to attempt to preserve our jobs through collectively-bargained modifications, or concessions, if you will, to our collective bargaining agreements, in order to save our jobs.

This is an essential principle of collective bargaining. But today, in this industry, that principle does not apply. Employers decide when they are no longer acceptably competitive and avail themselves of the legal solution to this situation allowed to them by the NLRB's double-breasted decisions.

H.R. 281 would end these abuses, which have proved to be a major source of disruption and litigation in the construction industry. It would do so by providing that, where there is a direct or indirect common ownership, management or control between two or more businesses engaged in the same or similar work in the construction industry, all of those entities would be considered a single employer within the meaning of the act.

And, any single employer in the construction industry, as thus defined, would be obligated to apply the terms of its collective-bargaining agreement to all other business entities which are part of the single employer within the geographical area covered by the agreement.

In short, it is our position that the NLRB should not be permitted to deprive workers in this vital industry of the rights which Congress expressly granted to them. To allow an administrative agency to subvert the clear intent of Congress by administrative fiat undermines the collective-bargaining process and the stability of labor relations in the construction industry.

Since the Board continues to flaunt the will of Congress, it seems clear that corrective legislation is required. We do not seek a broad overhaul of the National Labor Relations Board; nor do we propose any radical new approaches.

H.R. 281 has a narrow, very narrow, and specific focus, namely, correcting the damage that has been done by erroneous NLRB interpretations of those provisions of the act affecting construction workers. The bill is not only necessary to restore stability to construction industry labor relations, it is both fair and just.

It provides only that any party which enters into a collective-bargaining agreement, under which he received substantial benefits, must live up to that agreement throughout its term. And it is equally fair and just in its provision that employers may not evade those agreements through the sham device of double-breasting.

Accordingly, we urge the speedy passage of H.R. 281. Thank you, Mr. Chairman.

[Prepared statement of Robert Georgine follows:]

PREPARED STATEMENT OF ROBERT A. GEORGINE, PRESIDENT OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

I. INTRODUCTION

I want to thank this Committee for the opportunity to appear in support of H.R. 281, which we view as essential to assuring the stability of labor relations in the building and construction industry. The Building and Construction Trades Department is comprised of 15 national and international unions which in the aggregate represent a membership in excess of four million workers. We are, therefore, vitally concerned with the need to preserve stable relations in the construction industry, in order to serve the needs of employers, employees and the public as well.

In March of 1983, I appeared before this Committee to present the views of the Department and its constituent unions and their members on the failure of the National Labor Relations Board to enforce certain provisions of the National Labor Relations Act in the manner which Congress intended, and in a manner which jeopardized the stability of labor relations in this vital industry. At that time, we did not seek amendments to the statute. The purpose then was to call attention to the failure of the Board properly to apply the Act as it was then written. I stated to this Committee that we merely sought that which Congress gave us in 1959, but which the NLRB had since undermined.

Unfortunately, the conditions which I addressed in 1983 have become even more serious today, and I believe that the time has come when the only answer lies in legislation. Indeed, as this Committee knows, as a result of its hearings last summer and its subsequent report entitled, "The Failure of Labor Law—A Betrayal of American Workers," the direction of the NLRB is getting worse and not better. If we are to achieve justice, and if the original intent of Congress a quarter of a century ago is to be effectuated, the solution lies in legislation.

Let me retrace for you the particular difficulties which the employees in the construction industry have faced, the efforts of Congress to seek a legislative solution for those problems in 1959, and the undermining of those efforts by the Board in the years since.

Even before the enactment of the NLRA, workers in the construction industry depended upon the collective bargaining process to assure them of fair wages, safe working conditions and job opportunities. As you know, Congress passed the NLRA in 1935 to protect the right of employees to bargain collectively. In the course of amending the Act in 1959, Congress specifically sought to accommodate the unique conditions in the construction industry.

Yet today, in 1985, collective bargaining in the construction industry appears to be an "endangered species" because it is virtually impossible for workers in our industry to avail themselves of their statutorily protected right to secure and maintain collective bargaining representation. This denial of their statutory rights has resulted from the failure of the administrative agency charged with enforcing those rights, the National Labor Relations Board, to apply the National Labor Relations Act to the construction industry in the way that Congress intended when it amended the Act in 1959, and in a way which takes into account the unique characteristics of the industry which set it apart from other industries. In the last dozen years, decisions of the NLRB have ignored the special characteristics of the construction industry and Congress' desire to facilitate collective bargaining in that industry. The Board has effectively placed in the hands of employers, not workers, the power to decide whether union representation may be secured.

In order to understand the predicament that construction workers find themselves in today, you must go back and review the history of the National Labor Relations Act. The Wagner Act was the first federal statute to establish what has become an immutable principle of American law—the right of workers to form unions and bargain collectively. But one need not be a scholar in American history to know that collective bargaining and union organization did not begin in this country with enactment of the Wagner Act. Unions had been a part of the fabric of our society long before 1935.

But in 1935, Congress was faced with a national crisis in labor relations to which it was compelled to respond. That crisis was created by the great industrial union organizing campaigns in the largest and most anti-union industries in this country. The great tide of industrial organizing had, for the first time, brought employers in the steel, auto, rubber and other major industries to the realization that federal labor legislation might be in their own best interest in the face of sit-down strikes, mass picketing, product boycotts and a myriad of other organizing techniques. Congress responded to this unrest with the Wagner Act which, as you know, in Section 7 promises that:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

The Act, while providing this right to workers in all industries, contains election provisions which were designed for elections in the industrial setting, but are totally unsuitable for the construction industry.

Under the Act, the NLRB was, and is, required to hold elections on an employer-by-employer basis, whenever a petition containing a sufficient showing of interest in an appropriate bargaining unit is filed. The filing of the petition is the first step on a long and winding road which may lead to the NLRB's certification of a union as collective bargaining representative. First, the employer may demand a hearing before the Board's Regional Director, at which he may contest the appropriateness of the unit, contest the placement of individuals in the bargaining unit, oppose the appropriateness of the union to represent the employees and assert a host of other arguments. Briefs may be filed. Thereafter, the Regional Director considers the arguments and evidence and issues a decision. That decision may then be appealed by way of a Request for Review to the NLRB in Washington. The Board may grant or deny the Request for Review. If the request is denied, the case is remanded to the Region for the setting of an election. If the request is granted, the matter is reviewed by the Board and a decision is issued, affirming or setting aside the Regional Director's decision. An employer may then challenge the ballots of individual employees or file objections to the conduct of the election or the election campaign. Again, the employer can demand a hearing on the issues raised by those challenges and objections and can appeal the Regional Director's decision to the NLRB.

The road does not end there. An employer, but not a union, may test a Board decision on certification by refusing to bargain with the union and appealing the Board's decision to a U.S. Court of Appeals.

The most recent figures published by the Board indicate that, on the average, it takes 296 days to process an election petition, if contested, from the date of the filing of the petition until the date of the final NLRB decision—almost 10 full months. And those figures are just for cases that are not appealed to the courts. Such appeals take at least several months, and often years, to process.

But we are not here today to complain about the time delays inherent in processing a contested election case before the NLRB. We are here to explain that, while such delays are severe impediments to the exercise of free choice by workers in all industries, they totally destroy the opportunity for such free choice in the construction industry. As you know, the construction industry is characterized by a work force constantly in flux, changing from employer to employer, and geographic area to geographic area, depending upon where work opportunities present themselves. Seasonality and intermittence characterize the employment pattern. While no precise figures are available, on the average, very few construction jobs last longer than 10 months. Therefore, even if the election procedures of the Act are invoked and the union ultimately prevails, the employees will not be represented by the union. When the employer begins his next project, the union can once again invoke the election procedure and start the process all over again, hoping that the election procedure ends before the job does. Obviously, under these circumstances, employers will take advantage of all procedural steps available in order to assure that even if the union ultimately wins a legal victory, it wins nothing in fact.

Let me give you a recent example that demonstrates dramatically the point I have just made. In March of this year, the United States Court of Appeals for the Sixth Circuit enforced a decision of the NLRB in a case entitled, *NLBR v. Engineers Constructors, Inc.*, 118 LRRM 2990. On June 7, 1983, Local 1441 of the Laborers' International Union of North America filed a petition with the Board seeking certification as the bargaining representative of laborers employed by ECI at a specific job site in Memphis, Tennessee. The Board found that the work on the project began in January, 1983, and was estimated to be completed by April of 1984. Following a hearing, an election was ordered on July 1, 1983. ECI petitioned the Board for review, trying to stall the election, but its petition was denied on July 27, 1983. On July 29, 1983, the election was held and, on August 23, 1983, the union was certified as the bargaining representative of the employees at that job site. ECI later refused to bargain with the union, which then was forced to file unfair labor practice charges with the Board. The Board issued a complaint and, on April 30, 1984, the Board issued an order finding that ECI had violated the act and directing ECI to bargain with the union. 270 NLRB No. 36. Eleven months later, in March of this year, the Court of Appeals granted enforcement of the Board's bargaining order. That enforcement order came 21 months after the petition was filed and almost one year after the scheduled completion of the job in question. From a technical standpoint, they, the union and the Board won a victory. It was a pyrrhic victory, however, and in fact the union won nothing and the employees never gained the right to be representated by the union of their choice.

Even if the union petitions for all current projects within a geographic area being performed by the employer, the same time restraints come into play. And, in that situation, the union must attempt the nearly impossible task of remaining in contact with a large itinerant workforce whose members, by the time the election is conducted, will have worked for numerous different employers in scattered geographic locations and will have little if any interest or inclination to vote.

The Act, as written in 1935, was structured with the major industries I mentioned earlier in mind. It was intended to work quite well in the normal industrial setting characterized by a stable complement of employees who work for the same employer at the same plant location on a continuous basis. In that situation, there is a reasonable assumption that at the end of the election process, an identifiable employer and identifiable group of employees will remain for purposes of collective bargaining representation. In the construction industry, the presumption is the opposite.

Soon after passage of the 1935 Act, the NLRB realized that its election procedures were unworkable in the construction industry. The Board recognized that the structural realities of the industry precluded useful elections and also that any attempt to conduct elections on a job-by-job basis would quickly exhaust the financial resources of the Board. So the Board ignored the construction industry from 1935 to 1947. After all, Congress had been concerned with the labor relations instability in those industries struggling with industrial organizing in 1935. The construction industry was not characterized by such instability. Indeed, in 1935, labor relations in the construction industry were far more than they are today.

II. THE PREHIRE AGREEMENT

The stability in the construction industry in 1935 and for decades prior was based upon the prehire agreement. The prehire agreement is quite simple in concept. Because of the market realities of the construction industry, employees are rarely continuously employed by the same employer for a substantial period of time. The work force of each employer fluctuates according to his success in securing bids. The more success—the larger the work force; the less success—the fewer workers required. At the end of each project, the employer may or may not have another project at which he can offer employment to his current employees. By the same token, when an employer does succeed in a bid award, he must very quickly be able to secure skilled employees. The employees required will be craftsmen of all varieties, upon whose skills the employer must be able to immediately rely. The employer cannot afford to commence each new job with an on-the-job training program to develop skills. The prehire agreement is the only workable collective bargaining agreement in the circumstances of this industry.

The union negotiates, not on behalf of current employees of each employer, but rather, on behalf of the pool of hiring hall registrants who are available to work for the employers who are able to secure work in the area. Everyone on the out-of-work list is a potential employee and, through the union, has a voice in determining the wages and conditions under which he will work if market conditions provide employment.

The employer, on the other hand, benefits not only from the availability of skilled workers through the hiring hall, but also from the fact that the prehire agreement provides him with foreknowledge of his labor costs, which assists him in preparing his bid estimate. The hiring hall and the prehire agreement characterized the construction industry long before the Wagner Act was conceived.

Because of these unique characteristics, the NLRB ignored the construction industry from 1935 to 1947. Elections were not conducted in the industry, and prehire agreements, although technically a violation of the Wagner Act because they are signed before the employer has a representative complement of employees, continued as the norm. In its deliberations on the Taft-Hartley Act in 1947, Congress showed no special concern over the Board's treatment of elections and prehire agreements in the construction industry. Congress did, however, exhibit, a concern over secondary boycotts in all industries, including the construction industry, and dealt with them in Section 8(b)(4). Accordingly, after the passage of Taft-Hartley, the Board felt compelled to assert jurisdiction over the construction industry for all purposes, including representation elections.

In 1948, the NLRB carried out a pilot program of construction industry elections under the union shop authorization provisions of the Act. The result was that, with the full cooperation of the unions and employers involved, the election costs were so staggering that the General Counsel ultimately recommended that the Board ignore the statute. Commencing in 1951, and in several sessions of Congress thereafter, bills to amend the Taft-Hartley Act to deal with unique aspects of the construction industry were introduced. These modifications were ultimately enacted as part of Title VII of the Landrum-Griffin Act in 1959.

The legislative history of what became Section 8(f) of the NLRA shows that these modifications were enacted to accommodate the Act to the unique conditions in the construction industry and to preserve the successful pattern of bargaining in the industry. Congress described those unique conditions in these terms:

The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and none of them continuously. Jobs are frequently of short duration, depending on the various stages of construction—S. Rep. No. 187, 86th Cong., 1st Sess. at 27 (1959).

Congress also recognized, again quoting from the legislative history, that:

A substantial majority of the skilled employees in this industry constitute a pool of such help centered around their appropriate craft union. If an employer relies upon this pool . . . there is not doubt . . . that the union will, in fact, represent a majority of the employees eventually hired—S. Rep. No. 187, 86th Cong., 1st Sess. at 28 (1959).

In order to permit the continuation of what was plainly the prevailing practice in the construction industry, Congress in 1959 added Section 8(f) to the Act. That section specifically authorized prehire agreements in the construction industry. To the relief of all parties, and primarily the NLRB, the mechanism that had so well served the interest of both workers and employers in the construction industry was at least formally protected by the law. Let me clarify and important point. Section 8(f), while authorizing prehire agreements, preserved employee free choice. It provided that, while prehire agreements were not deemed to violate the Act, such agreements could not serve as a bar to an election petition filed pursuant to Section 9 of the Act. This is a specific safeguard to allow employees to reject any prehire bargaining representative with which they are dissatisfied.

We believe that this is a uniquely appropriate accommodation for our industry. Workers are assured that their unions can negotiate agreements on their behalf which will establish the wages and conditions available to them if the market conditions provide employment. They are also assured that, through those agreements, employers can be required to seek workers through the hiring hall and, accordingly, workers need register with only one source of employment instead of wandering from project to project, day in and day out, seeking work opportunities. At the same time, however, if workers believe that their bargaining representative has not provided acceptable representation, they may file a decertification petition and rid themselves of the union.

The prehire system of collective bargaining, validated by Congress, served the industry well until the early 1970's, when the Board issued a series of decisions which undermined the viability of prehire agreements. In *R.J. Smith Construction Co.*, 191 NLRB 693 (1971), the Board held that employers who enter into prehire agreements were free to repudiate those agreements unless and until the union could establish that it represented a majority of the employer's employees.

In 1978, in *NLRB* v. *Ironworkers Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1078), the Supreme Court affirmed the NLRB's interpretations of Section 8(f). I stress that the Supreme Court merely affirmed the NLRB's view of the statute. In doing so, the Court specifically stated that, while other interpretations of the statute might also be appropriate, the Court would defer to the expertise of the Board and accept its interpretation.[1]

In our view, the Board's interpretation reflects a total misunderstanding of both the structural reality of the construction industry and the intent of Congress in its 1959 amendments to accommodate the statute to those realities. As I stated earlier, Congress intended that the prehire agreement and the wages and conditions provided for therein would be fully enforceable by the union on behalf of the employees it represented, until such time as those employees had voted, through an NLRB election, to change their bargaining representative.

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[1] Later, in *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983), the Supreme Court reaffirmed that an 8(f) prehire agreement may be repudiated until the union establishes majority status, but the Court did rule that the union may sue to recover monetary obligations assumed by the employer up to the point of repudiation.

Today, under the Board's view of prehire agreements, an employer is, in many circumstances, free to repudiate a prehire agreement of any duration and the union is powerless to enforce the agreement unless it can prove that, at some previous time, it has established majority support among a stable complement of the employer's workers.

You do not have to be a legal scholar to know that a rule which lets one party to a contract repudiate this agreement at will is wrong and unfair.

After an employer repudiates a prehire agreement, he may then proceed to hire non-union employees. He thus assures that the union is precluded from establishing majority support, while the union's real majority support—the workers who have relied upon the employer's prehire agreement commitments—languish on the out-of-work list at the hiring hall. This result, in our view, is not only wrong, but nonsensical. Congress intended a presumption of majority support until such time as the workers affirmatively rebut that presumption through an election. In the situation described herein, an employer hides behind Higdon, thumbs his nose at the union and its members, and defies the union to file an election petition, knowing full well that the election procedures are overwhelmingly stacked in his favor. What we have then is an erroneous NLRB interpretation of Section 8(f) which destroys precisely what Congress intended to preserve in 1959.

H.R. 281 would reverse the effects of this erroneous NLRB interpretation and would elevate 9(a) collective bargaining agreements. In other words, they would remain fully enforceable until and unless the workers voted to reject their union. The stability which Congress intended in 1959, by expressly validating prehire agreements, would thus be achieved, while at the same time guaranteeing employees full protection of the choice of a bargaining representative through the use of the Board's election procedures whenever they wish.

The damage that the NLRB has done to collective bargaining in the construction industry goes far beyond Higdon. Let us asssume for the sake of agrument that a union can prevent an employer in the construction industry from repudiating an ongoing prehire agreement. The NLRB has provided this reluctant employer with another opportunity to avoid his collective bargaining obligations and to deny workers the benefits of union representation. The NLRB has allowed employers to avoid these obligations by permitting them to establish double-breasted operations.

III. THE DOUBLE-BREASTED EMPLOYER

Double-breasted operations are a phenomenon unique to the construction industry. Although we cannot identify who coined the term "double-breasted" to identify these types of construction operations, it refers to a union construction company and a non-union construction company, both of which are commonly owned and controlled. A dozen years ago, the term was virtually unheard of. Today, it has become an easy way for employers to avoid their obligations to abide by collective bargaining agreements.

The beginning of the tremendous growth of double-breasted operations coincides with, and is in large part attributable to, the NLRB's 1973 decision in a case known as Peter Kiewit Sons' Company, 206 NLRB 562. In that case, Kiewit was bound to a collective bargaining agreement with the Operating Engineers in the State of Oklahoma for the performance of highway construction work. The contract had been in effect for years. In 1972, Kiewit brought a separate corporate subsidiary known as South Prairie Construction Company into the State of Oklahoma for the first time for the purpose of bidding on highway construction work on a non-union basis. South Prairie immediately began to secure such work and refused to recognize and abide by the Operating Engineers' collective bargaining agreement. Kiewit, in the meantime, withdrew from bidding for highway construction work in the State. Kiewit defended its actions on the grounds that it could be more competitive in bidding for highway work on a non-union basis.

Kiewit made no attempt to disguise its purpose. It had decided that it would be more profitable to ignore than to comply with its commitment to perform construction work in Oklahoma under a collective bargaining agreement. Accordingly, Kiewit shifted the work previously performed by employees of its union company over to the employees of its non-union company. Again, it does not take a legal scholar to recognize that a system which permits an employer to evade his written agreement by merely setting up a new company to perform the same work on a non-union basis is just plain wrong. That was not what Congress had in mind in

1935 when it guaranteed workers the right to bargain collectively, or in 1959 when it attempted to facilitate collective bargaining in the construction industry.

Nevertheless, the NLRB found that the Act permitted Kiewit to evade his bargaining agreement, primarily because Kiewit and South Prairie independently controlled their own labor relations policies. The United States Court of Appeals for the D.C. Circuit, however, rejected that conclusion. It found that common control of labor relations was not necessarily the critical factor and emphasized the importance of seeing whether there was an "arms-length" relationship between the two employers. *Operating Engineers Local 627* v. *NLRB*, 518 F.2d 1040 (D.C. Cir. 1975). Although the Supreme Court upheld that part of the D.C. Circuit's decision, it sent the entire matter back to the Board to determine whether, even if Kiewit and South Prairie constituted a single entity, the employees of each company constituted separate bargaining units. *South Prairie Construction Co.* v. *Operating Engineers Local 627*, 425 U.S. 800 (1976). Not surprisingly, in its second opinion, the Board decided that even though the two companies constituted a single entity, they were separate bargaining units, and thus they reached the same conclusion they had originally reached, i.e., the Operating Engineers agreement did not apply. Peter Kiewit Sons, Inc., 231 NLRB 76 (1977).

The *Kiewit* case is the landmark case on double-breasting. It is the road map for employers seeking to escape their collective bargaining obligations by establishing non-union operations. The 1973 Board decision contained a statement which at the time was incorrect, but which has become a self-fulfilling prophecy:

It is not uncommon in the construction industry for the same interests to have two separate organizations; one to handle contracts performed under union conditions, and the other under non-union conditions—206 NLRB at 562.

Today, double-breasting is an openly acknowledged way of evading collective bargaining obligations. In November of 1981, Thomas E. Daley, President of the Associated General Contractors of America, in an interview with the Engineering News Record, described the motivation of double-breasting as follows:

There is no union contractor I know of that by choice would go open shop for the hell of it. It's a lot easier for him to stay union as long as he can compete . . . but the minute he starts to lose work and his business is threatened, he will go double breasted or open shop, that's all there is to it. He has to.

Thus the employer merely makes a unilateral decision to operate on a non-union basis in order to avoid a collective bargaining agreement. As I said a moment ago, the *Kiewit* decision contained a self-fulfilling prophecy. In 1973, when the NLRB placed its imprimatur on the practice in the *Kiewit* case, double-breasting was extremely uncommon. It was believed that such sham maneuvers clearly violated the law. If it was done, it was done in the shadows to avoid publicity and detection. Since 1973, however, the practice has come out of the shadows, and corporations publicly acknowledge their double-breasted status. For instance, a 1981 survey conducted by the Engineering News Record disclosed that 77 of the 400 top construction companies in the country labeled themselves as double-breasted operations. That number has certainly increased in the four years since that survey was taken. And among smaller contractors, it is even easier and more common to form double-breasted operations.

We believe that the law should not permit employers to avoid collective bargaining contracts by playing corporate shell games. Certainly, we are not saying that corporations should be denied the ability to form subsidiaries, but we are saying that when subsidiaries are formed to perform the exact same work of a unionized subsidiary, only on a non-union basis, then the company violates the law in refusing to apply the collective bargaining agreement to both operations.

We of the building trades are sympathetic to the need of our employers to remain competitive, and I am proud of the record of the building trades over the last decade in actively pursuing the elimination of non-competitive work practices at the bargaining table. In our view, however, the National Labor Relations Act dictates that the workers and employers must together negotiate solutions to non-competitive aspects of collective bargaining agreements and prohibits employers from unilaterally solving such problems through a decision to become double-breasted. We believe that we are entitled to the opportunity to attempt to preserve our jobs through collectively bargained modifications, or concessions if you will, to our collective bargaining agreements, in order to save our jobs. This is an essential principle of collective bargaining. But today, in this industry, that principle does not apply. Employers decide when they are no longer acceptably competitive and avail themselves of the legal solution to this situation allowed to them by the NLRB's double-breasted decisions.

H.R. 281 would end these abuses, which have proved to be a major source of disruption and litigation in the construction industry. It would do so by providing that, where there is direct or indirect common ownership, management or control between two or more businesses engaged in the same or similar work in the construction industry, all of those entities would be considered a single employer within the meaning of the Act. And, any single employer in the construction industry, as thus defined, would be obligated to apply the terms of its collective bargaining agreement to all other business entities which are part of the single employer within the geographical area covered by the agreement.

Although these amendments would be new to the National Labor Relations Act, the approach is neither radical nor untried. In Canada, for example, at least six Provinces have enacted legislation to cover what they term the "related employer" situation. These legislative enactments focus on the need to preserve established collective bargaining relationships, and thus cover the typical case of the double-breasted employer which is encountered so frequently in this country. To our knowledge, these "related employer" provisions have been enacted in Ontario, British Columbia, Alberta, Manitoba, Nova Scotia and Prince Edward Island. There is also a similar provision in the Canadian Labour Code, for federal (inter-provincial) employers (Section 133).

The Ontario provisions, Sections 1(4) and (5) of its Labour Code are particularly instructive. Section 1(4) provides that, when the Ontario Labour Relations Board determines that several associated or related businesses are carried on "under common control or direction," the Board is empowered to treat the business entities or individuals involved "as constituting one employer for the purposes of this Act." Section 1(5) goes even further and deals most effectively with the typical problem of proof which is found in these situations. That section provides that when an allegation has been made that more than one business or individual are under common control or direction, the "respondents [the charged employers or individuals] shall adduce at the hearing all facts within their knowledge that are material to the allegation." This provision shifts the burden of producing the relevant evidence to the parties who have control over it, namely, the employers themselves.

H.R. 281 would thus provide protections to American workers in this industry similar to those which are already guaranteed to many Canadian workers.

IV. CONCLUSION

Although Congress enacted the NLRA to permit employees to bargain collectively through representatives of their own choosing, and amended the Act in 1959 specifically to permit construction industry employees to bargain collectively in accordance with existing practices in the industry, the NLRB in the last dozen years has to a very large extent taken that right away from construction workers. The NLRB has given employers in this industry the unilateral and almost unfettered right to repudiate, ignore or evade a collective bargaining agreement that they sign. The result, I am afraid, is that the system of collective bargaining, which has been the basis of stability in the construction industry for over half a century, has been seriously undermined. Plainly, this is not what Congress intended in 1935 or in 1959, and we do not believe that it is what Congress intends today.

In short, it is our position that the NLRB should not be permitted to deprive workers in this vital industry of the rights which Congress expressly granted to them. To allow an administrative agency to subvert the clear intent of Congress by administrative fiat undermines the collective bargaining process and the stability of labor relations in the construction industry. Since the Board continues to flaunt the will of Congress, it seems clear that corrective legislation is required. We do not seek a broad overhaul of the National Labor Relations Act; nor do we propose any radical new approaches. H.R. 281 has a narrow and specific focus, namely, correcting the damage that has been done by erroneous NLRB interpretations of those provisions of the Act affecting construction workers. The bill is not only necessary to restore stability to construction industry labor relations, it is both fair and just. It provides only that any party which enters into a collective bargaining agreement, under which he receives substantial benefits, must live up to that agreement throughout its term. And it is equally fair and just in its provision that employers may not evade those agreements through the sham device of double-breasting.

Accordingly, we urge the speedy passage of H.R. 281.

Thank you.

Mr. CLAY. Thank you.

Mr. Georgine, how expansive is double-breasting in the construction industry, in your opinion?

Mr. **Georgine**. Well, it is running rampant. In the last few years, because of the easy way the Board has made it for contractors to own two companies and operate two companies, one union and one nonunion, we find that it is becoming increasingly more and more the practice rather than, the exception, Mr. Chairman, it is the rule.

Mr. **Clay**. How do you respond to the view that is expressed by some that if we legislate to eliminate double-breasting that more contractors will then go nonunion?

Mr. **Georgine**. I heard that argument many years ago when we had situs picketing before the Congress, and people said, well, won't this law make everyone either union or nonunion, and the contractors that argued against it felt that it would not.

I firmly believe that what the law will do is just correct the inequities that have been created by the NLRB. If it means that the contractor certainly has a free decision to go union or nonunion, we have no objection to that.

If he has a collective bargaining agreement, he should not be able to circumvent the terms of that agreement by setting up another paper company.

Mr. **Clay**. Did you want to respond to that? I am a little puzzled by some of those who are advancing the argument that if we pass this bill, it will make contractors go nonunion. I am puzzled in view of the fact that some of them are on record, as being antiunion. I would think that they should be supporting the legislation rather than opposing it, if it in fact will cause the union-free environment in the construction industry, and so that puzzles me greatly.

How do you respond to the claim that unions in the construction industry already have more power than any other unions, and this is just some additional power, or that passage of this bill would be additional power, and it is unreasonable, and we should not give any more power to you mighty, strong, greedy people?

Mr. **Georgine**. First of all, the statement is totally inaccurate. If we have got all this power, I am not aware of it. I wish somebody would tell me where it is, so we can use it. The fact of the matter is that we are being deprived, really, of the safety net, the security of our bargaining process that all other unions have.

It is a different kind of industry. We are not entitled to those protections. It is an industry where people have a job for an employer for a very short period of time, and then they go to another employer, and then another employer.

There is no legal practical way to organize in the construction industry. You cannot have an election under the terms, and we have gone all through this in our previous testimony, Mr. Chairman.

The time limits are such that there is no way that you can organize a construction job, if we have all this power, I don't know where the law gave us the power.

The law gives us certain security that we are entitled to that we are not getting, because the NLRB is subverting the law, but I don't know about all this power that they are talking about.

Mr. CLAY. Thank you.

Mrs. Roukema.

Mrs. ROUKEMA. I don't really have a specific question for you, Mr. Georgine, but let me ask: do you feel that the NLRB has singled your union out unfairly for an interpretation of the legislation because of the nature of your business or is it being even-handedly applied in terms of its overall philosophy to all unions?

You are suggesting that we put something into legislation that will favor your industry.

Taking that premise or that principle, it seems to me to be a first step in dismantling the system as we now know it. Do you understand my point? I am asking you why you think the NLRB did this, and do you think they unfairly singled you out, or is it a basic flaw in the system, in your opinion?

Mr. GEORGINE. If I may, I would like to respond to that question in this way: First of all, I only represent construction workers employed in the construction industry, so I don't really want to edge over into that other section, although I have very strong opinions.

To say has the NLRB singled out our industry, I will stay away from that, but let me say that the effect of what the NLRB has done has singled out our industry.

They have, in effect, rendered decisions that are contrary to what the Congress intended when they passed the law, and we support that argument in our long, written testimony, and go after case after case, and we show examples.

The fact of the matter is that, if the administrative agency is not performing the job and doing harm to an industry, and is really acting in a way that is contrary to what Congress intended, then what problem is there in dismantling it?

That would bring no big tears to my eyes.

Mrs. ROUKEMA. My problem is that, as you have correctly pointed out, your industry is a little different and your union's problems are a little different than some of the others, and therefore, doesn't it practically mean that the judgment could be a right and just one under the circumstances, even though your union doesn't like it?

Mr. GEORGINE. Well, you asked the question in a way that——

Mrs. ROUKEMA. What I am saying is that I don't think that your union should want to be more than equal.

Mr. GEORGINE. We would just like to have what we are entitled to, not more, but what we are really saying, and the Congress said this, and my legal counsel here can give you maybe a more specific answer, but from 1947, for instance, when Taft-Hartley was originally passed, we cite what the Congress said about the construction industry.

And the fact of the matter is that the law, when it was passed, really related to the industrial sector, and to give relief to the industrial sector, and there were things in the law that could not be directly applied to the construction industry, because of its uniqueness, and we went from 1947 to 1959, I think it was, when the law was amended.

It was at that time that we referred to the differences between construction and the industrial sector, and so, there is a unique character to construction, and there is a difference, and we are not looking for more than all other workers get, but all we are looking to is to protect our collective bargaining system, if we have a right to the collective bargaining system.

Mr. **Cohen**. My name is Laurence Cohen, and I am Mr. Georgine's counsel. You have to place your question in historical perspective. In 1959, it was the Congress that recognized that the characteristics of the construction industry are so different and so unique that they needed special accommodations that resulted in enactment of section 8(f), and the construction industry proviso to section 8(e), and that was Congress' doing.

And what we are here seeking today is, if you will, a reinstitution of what Congress gave us in 1959, but which the Board, through its decisions since 1959 has practically taken away, with its decisions.

Mrs. **Roukema**. If in that 1959 legislation the Congress had intended prehire agreements to be fully enforceable prior to majority support, why was that not clearly stated in the law?

Mr. **Cohen**. That is one of the basic points, and to me, it is with one exception—let me put it the other way around. There is nothing in section 8(f) which indicates that it is not to be fully enforceable with the one proviso that employees without the usual contract bar rules applying may get an election at any time during a prehire contract, but beyond that exception, there is nothing in section 8(f) which indicates those agreements were not to have the same sanctity as other collective bargaining agreements.

And that came about with this line of Board cases, R.J. Smith, and so on.

Mrs. **Roukema**. This seems to be a subject as to the interpretation of that particular part of the law that will be open to other questions.

Thank you.

Mr. **Clay**. Mr. Dymally.

Mr. **Dymally**. Sometimes you have a construction company that has a collective bargaining agreement, and then they will go and subcontract with nonunion subcontractors. Does it fit into this category, and does that create some problems for your union?

Mr. **Georgine**. That creates some problems, but that does not fit into what we are talking about right here. What we are saying right here is that the contractor himself creates another company in order to circumvent the terms of the collective bargaining agreement.

Mr. **Dymally**. How do you deal with the situation where he stays with the contract, the collective bargaining agreement, but then goes out and subcontracts a lot of the job with nonunion help?

Mr. **Georgine**. Well, that is a problem that we deal with in accordance with whatever the terms of the collective bargaining agreement is. If there is no bar established in the collective bargaining agreement preventing him, then we have to live with it.

Mr. **Cohen**. If I may add briefly, through the construction industry proviso to section 8(e), we are able to enter into subcontracting clauses which frequently prevent the situation you describe.

Mr. **Georgine**. That would have to be in the collective bargaining agreement with that contractor.

Mr. **Dymally**. Once you find out about the practice, do you have the ability to renegotiate that particular contract?

Mr. **Georgine**. Or we may already have had a subcontractor clause in the collective bargaining agreement that would establish a bar preventing him from doing just that, but we may not, and if we don't, we have to live it.

Mr. **Dymally**. How prevalent is that practice?

Mr. **Georgine**. It is very common.

Mr. **Clay**. Mr. Armey?

Mr. **Armey**. I am kind of new, and labor laws always are confusing so I hope you will be patient.

Why wouldn't I, if I wanted to form a construction firm and bid a contract for a large building, put an ad in the paper saying various skilled construction workers are required, no union members need apply?

I might prefer to do that. Would that be all right?

Mr. **Georgine**. It wouldn't make me very happy, but you certainly have the right to do that.

Mr. **Cohen**. Except for the last section, which would be a clear violation of section 8(a)(3), in other words, no union members need apply. That is unlawful. You are free to hire whomever you wish.

Mr. **Armey**. That doesn't seem like a very fair labor practice to me. Why can't I say that?

Mr. **Cohen**. It is a judgment the Congress made in 1935, and through two amendments has stuck with.

Mr. **Armey**. I would have to accept union workers?

Mr. **Georgine**. Just as a union contractor accepts nonunion workers.

Mr. **Armey**. If it is possible that a majority of the people who might apply or that I might find qualified to work are union members, then would I have to enter into a pre-something contract?

Mr. **Georgine**. Prehiring contract? You don't have to, unless we go through the procedures and prove that we represent a majority of the employees and the NLRB, so rules—and you bargain with us and we end up with a collective bargaining agreement which is highly unlikely.

Mr. **Armey**. Again, I appreciate your patience with me. But where I came from, we just simply said we got a job, does anybody want to come to the job?

It never occurred to us we had to talk to a union. We were hiring people. What happens is that people would bid a job, and they would hire some workers, without going into a prehiring contract.

Mr. **Georgine**. They gain bargaining benefits in having a trade union who will supply them a skilled labor force. Once you make that decision as a contractor and enter into a collective bargaining agreement with one of our unions, you ought to live up to the terms of that contract agreement until it expires, and that you cannot by a sham create another company to circumvent the terms of that agreement.

That is all this proposed legislation will do.

Mr. **Armey**. This is double-breasting, this is why it bothers me. Obviously, I just don't understand why I would enter into a prehire arrangement with the union and make a contract to build this building with these union folks, and all of a sudden, I would find myself able to form another company and have a pool of workers that are not union.

Why couldn't I just go to that pool of workers in the first place?

Mr. **Georgine**. If you did, this legislation would not affect you.

Mr. **Armey**. You say this is a widespread practice?

Mr. **Georgine**. Yes, sir.

Mr. **Armey**. It seems very unusual to me that that could be a very widespread practice.

Mr. **Georgine**. Well, it is, and it is becoming more and more widespread with each successive month, so that is why we are concerned about it. That is why we are looking for legislative relief.

Mr. **Armey**. OK. There seems to be something missing here. Could you please explain what the problem is?

Mr. **Georgine**. I would certainly be happy to discuss it with you, and all of its ramifications at any time that would be convenient for you, and maybe you could get a better understanding of it.

Mr. **Armey**. Now, one of the other things about these prehire agreements is that there is something you call union security. That may or may not be part of the contract. What if I wanted to hire some nonunion people to come on that job and work with the union people?

Mr. **Georgine**. There is nothing in the law that prevents that.

Mr. **Armey**. What would happen if I did that?

Mr. **Cohen**. In your question, are you supposing that the contract contains a union security clause?

Mr. **Armey**. Well——

Mr. **Cohen**. That makes such a critical difference.

Mr. **Armey**. It does. Well, I can't imagine why I would agree to a union security clause. Why would I do that?

Mr. **Cohen**. They are typical in the industry, and they are found in most, but not all, construction industry agreements. If there is no union security clause in the agreement, that nonunion worker need never join the union.

On the other hand, if there is a union security clause, and you hire a nonunion worker following the seventh day of employment, he must join the union.

Mr. **Georgine**. I didn't interpret your question to mean whether he had to join or not join the union. You just asked if you could hire the nonunion employee, and there is nothing in the law that prevents you from doing that.

Mr. **Armey**. There would be no problem with anybody if I did that?

Mr. **Georgine**. We couldn't stop you.

Mr. **Cohen**. When we use our hiring halls, they must be operated on a nondiscriminatory basis, and if a nonunion worker asks for referral through the union hiring hall and meets the qualifications and is entitled to be the next one to be referred out, the union must refer him out.

Mr. **Armey**. I still can't understand why any employer would first make an agreement with a union and then go out and hire workers that are not union. Doesn't it make a difference whether you are in a right-to-work State or nonright-to-work State in this regard?

Mr. **Georgine**. No, it doesn't make any difference. You see, I have difficulty understanding that, also. If you have agreed to work under the terms of a collective bargaining agreement, why wouldn't you continue to work under the terms of that collective bargaining agreement rather than create another company to avoid that agreement?

That is the whole purpose of this legislation.

Mr. **Armey**. Is it possible that I might find myself unable to find labor in one skilled category or another if I don't enter a prehiring agreement with one or more or all possible trades?

Mr. **Georgine**. That is very possible. That is generally the case. If you do enter into an agreement and you have access to the union employees, they are skilled and trained under our procedures and our training programs, and are qualified to do the work.

It is difficult to get trained, skilled employees outside of that system, so that is one of the main reasons why employers enter into collective-bargaining agreements.

Mr. **Armey**. What if I wanted to hire union farmers and union bricklayers, could I do that?

Mr. **Georgine**. Yes, you could do it. It depends upon what the collective-bargaining agreement that you signed provides.

Mr. **Armey**. I could deal with the bricklayers?

Mr. **Georgine**. Yes, you could have a contract with bricklayers and not have a contract with carpenters or electricians or somebody else. There are many contractors like that who specialize in one particular part of the industry.

Mr. **Armey**. I wouldn't have any trouble making such a deal or negotiation?

Mr. **Georgine**. Not if you were an employer of electricians and entered into an agreement for electricians only, no.

Mr. **Armey**. OK. I appreciate your patience with me. I have always been a little confused by all of this, and never having had any experience as a member of a union in my own life, I never really had to live with any of their restrictions on my personal employment practices, so it is difficult sometimes for me to understand why somebody prefers to have somebody else bargaining for them.

I will study on it some more. Thank you.

Mr. **Georgine**. I would be glad to help you, if you would like.

Mr. **Clay**. Mr. Georgine, if there are no further questions, we certainly want to thank you for your testimony.

Mr. **Georgine**. Thank you for having me, Mr. Chairman.

Mr. **Clay**. The next witness is Mr. J.C. Turner, president of the International Union of Operating Engineers. Without objection, Mr. Turner, your entire statement will be entered into the record.

You may proceed as you see fit. I would like to note for the record that this may be the last time that Mr. Turner will be testifying before this committee in the capacity of president of the International Union of Operating Engineers. His long and distinguished career as president is coming to an end June 1, when he retires from that position.

So we certainly wanted to acknowledge the contributions that you have made to the construction industry, the labor movement, and wish you God speed.

STATEMENT OF J.C. TURNER, PRESIDENT, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, ACCOMPANIED BY MICHAEL R. FANNING, GENERAL COUNSEL AND JOHN J. BROWN, LEGISLATIVE DIRECTOR

Mr. TURNER. I will be President Emeritus of the union, and I hope to get a few assignments here and there, and I look forward to fulfilling those assignments, but it is a great pleasure to hear those favorable remarks from you, whom I respect so much.

Mr. CLAY. Thank you.

Mr. TURNER. Mr. Chairman and members of the subcommittee, as you know, I am president of the International Union of Operating Engineers. We have 350,000 members, and we represented workers in the construction industry over the last 89 years, which is a good, long time.

I thank you for the opportunity to appear before you today to present our views on H.R. 281, a bill to restore and preserve the integrity of collective-bargaining agreements in the construction industry.

Like President Georgine, I also appeared before you two years ago and described how decisions of the National Labor Relations Board, denying enforcement of prehire agreements and sanctioning the sham of double-breasted contracting, have provided employers with an almost unfettered ability to escape longstanding collective-bargaining relationships, defying workers to attempt to reestablish their bargaining rights through the NLRB's election procedures, procedures which have long been acknowledged to be unworkable in the construction industry.

The Board's prehire agreement and double-breasted contracting decisions have ignored the special characteristics of the construction industry which require, and which Congress intended be afforded, special accommodation.

The National Labor Relations Act is not working in the construction industry. Employee freedom to secure collective-bargaining representation, the most fundamental right and promise of the Wagner Act, has been undermined to the point of extinction. We believe H.R. 281 will help restore to construction workers the promise of the Wagner Act and its amendments.

The failure of the NLRB to properly accommodate the act to this industry with respect to representation issues stands in stark contrast to its demonstrated interest in conforming its secondary boycott decisions to the special characteristics of the industry.

The Board has drawn fine lines when it comes to construction industry picketing. An errant word on a picket sign or a misstep between primary and reserved gates results in immediate action by the Board to secure a court injunction against picketing, and exposes the union to extensive liability for damages.

The Board's concern with construction industry recognitional and organizational picketing has been similarly acute.

Building trades unions have for years argued that the Board's picketing rules have unfairly denied to construction workers rights enjoyed by workers in all other industries. Our views on common situs picketing are well documented and I am not here to renew the argument today, although I firmly believe that at the appropriate time it must and will be renewed.

My point is that, while the Board has drawn distinctions in its treatment of construction industry picketing versus other industries, when it comes to employee free choice, the Board has ignored the characteristics of the industry which require special treatment.

A 1982 case involving the IUOE demonstrates the extent to which construction workers' rights to collective-bargaining representation have become a matter of employer caprice under the NLRB's prehire agreement rules.

The case involved Operating Engineers local Union No. 312 in Birmingham, Alabama, and McDowell Contractors, Inc.

In 1964, McDowell signed its first collective-bargaining agreement with local 312, covering highway construction performed by the company within the union's jurisdiction. It was a prehire agreement pursuant to which McDowell was entitled to seek skilled operating engineers through local 312.

The collective-bargaining relationship between McDowell and the local continued unabated for the ensuing 16 years, expanding to cover building and heavy construction, as well as highway work.

In 1973 and thereafter, McDowell assigned its bargaining rights to the Birmingham chapter of the Associated General Contractors of America and became a formal part of the multiemployer bargaining unit included under the AGC's agreements with local 312.

From 1964 until 1980, McDowell performed many projects under the agreements, secure in the knowledge that whenever it needed operating engineers, they would be available through local 312.

Likewise, workers represented by the local union were secure in the knowledge that when McDowell was successful in bidding for work, they would be provided with work opportunities.

In short, both sides benefited from the bargain. But in 1980, all that changed.

In September 1979, 4 months after it had renewed its collective-bargaining agreements with local 312, McDowell submitted a bid for grading and paving work on an airport job within the local's jurisdiction. The bid was accepted. Work was to commence March 1, 1980.

In February, local 312, aware that McDowell had been awarded the airport work, contacted the company requesting a prejob conference as provided for in the applicable collective-bargaining agreement.

In response to this request, the company advised local 312 that, while McDowell Contractors, Inc. continued to have a collective-bargaining agreement with the local, the company had undergone a corporate reorganization on January 1, 1980, and a new company called McDowell Materials Corp. had been created.

McDowell Contractors, Inc. had then assigned its interest in the airport construction project to the new McDowell Materials Corp. It was the company's position that McDowell Materials had no collective-bargaining agreement with the union and the job would be performed on a nonunion basis.

This was a classic case of double-breasting. The company unilaterally determined to assign work which workers represented by local 312 were entitled to perform, to workers who were not represented by the union. A simple and easy way to avoid collective-bargaining obligations and one which has been encouraged by NLRB decisions.

Local 312, and other construction unions similarly affected, immediately went to court to enforce their rights. While McDowell Contractors continue to argue that McDowell Materials was a separate business entity, not subject to the union collective-bargaining agreement, when the case came to trial, the company added an additional defense.

It contended that even if the two companies were a single entity for collective-bargaining purposes, the decision of *Ironworkers Local 103* v. *Higdon Contracting, Inc.*, 434 U.S. 335, the company was entitled to repudiate its prehire agreements prior to the commencement of the airport project. In other words, if we can't strip the workers rights one way, we will do it another.

McDowell's Higdon argument was premised upon the contention that the company had traditionally secured new employees at the commencement of each new project and thus had not maintained a stable complement of employees.

The company argued that in order for the unions to enforce their agreements on the airport project, they would first have to establish majority support among the employees on this project.

This was a marvelously self-serving argument in view of the fact that the company had already ignored its collective-bargaining obligations and secured nonunion employees to work on the new project, thereby precluding any possibility of the unions establishing majority support. A self-serving argument and yet, under the current state of NLRB law, valid.

The unions' initial response was that the *Higdon* decision was just plain bad law. But, recognizing that the Federal district court had no choice but to attempt to apply Higdon, they pointed out that the hiring hall system is intended to distribute available work among available workers in such a fashion that a stable complement of employees will be the exception rather than the rule.

Accordingly, they argued, if majority support were to be the yardstick, that yardstick should be applied to the entire multiemployer bargaining unit of which McDowell had been a part since at least 1973, that is, all AGC employers bound to the collective-bargaining agreement.

Since the available work consisted of all work performed by those employers, and the union as bargaining representative has secured the benefits of this agreement for all workers available in the area, majority support should be measured among all workers employed under the agreement rather than merely those on jobs that McDowell had performed.

In response to this argument, the company cited a decision of the fifth circuit court of appeals in a case called *Haberman Construction,* 641 F.2d 351, which had expanded on Higdon. The court in Haberman ruled that even in a multiemployer bargaining unit, the union must prove its majority support on a project-by-project basis.

In my view, this expansion of Higdon all but completed the perversion of the 1959 intent of Congress to stabilize collective bargaining in the construction industry by legalizing prehire agreements.

Under this rule, the employers, not the workers, decide after each project whether collective-bargaining representation will continue. I defy anyone to explain to me how such a situation promotes stability or protects employee free choice in this industry.

As was to be expected, relying on Higdon and Haberman, the district court ruled in favor of McDowell. It was unnecessary for the court to address the double-breasting issue which had given rise to the case.

The unions appealed to the eleventh circuit court of appeals. In July 1982, the court issued a brief decision affirming the district court. The circuit court felt constrained to follow the law of the circuit established in the *Haberman* case.

The eleventh circuit had at the time of Haberman been a part of the fifth circuit.

Significantly, one of the three judges that decided the *McDowell* case, Judge Goldberg, a senior circuit judge, had participated in the *Haberman* decision.

While acknowledging that the McDowell court was required to follow the Haberman precedent, Judge Goldberg felt constrained in McDowell to write a concurring opinion expressing his judicial concern over what Higdon and its progeny Haberman have created in the construction industry.

While I readily concede that we of the building trades cannot expect judges to have any special understanding of the unique characteristics of the construction industry, Judge Goldberg's remarks capture with remarkable clarity the dilemma which has been created, and the abject frustration faced by construction unions in its wake.

Said Judge Goldberg:

> It is my position that the rule set forth by the en banc court in Haberman leaves those in the construction trades without effective protections of collective bargaining, nomadic orphans in labor's maelstrom.
>
> The rule adopted by the en banc court in Haberman forces unions to demonstrate majority support at each construction project before they can enforce an areawide prehire agreement at that project.
>
> I believe that this rule imposes an impossible burden upon the exercises of important rights secured by the National Labor Relations Act.

This impossible burden on construction workers' rights was never intended by the drafters of the Wagner Act. Indeed, recognizing that the strictures of both the Wagner and Taft-Hartley Acts impinged upon employee free choice in this industry, amendments to alleviate this impingement were grafted to the Landrum-Griffin Act.

Chief among those was the amendment authorizing construction workers to secure bargaining representation through prehire agreements. Today, as a result of Higdon and subsequent cases expanding upon it, workers still have the ability to secure representation rights through prehire agreements, but are almost powerless to enforce those rights. This, I submit, is a travesty.

Confronted with the facts I have just presented, antiunion employers will respond:

> What is the big problem? If construction workers want to secure their right to be represented, let them file an NLRB election petition like workers in any other industry.

Such response is both facile and totally self-serving, for as everyone, including unions, employers, the NLRB and Congress have long recognized, the National Labor Relations Act's election provisions were not developed for, and are virtually useless in, the construction industry.

They provide no alternative for construction workers disenfranchised by the repudiation of a prehire agreement, or a double-breasting scheme.

We have gone to court in other cases over the years, which I will not take up your time with, but summarize by saying that the antiunion employers and employer groups take great satisfaction in publicizing the vast increase in the number of open shop contractors over the last decade.

They attribute this growth to the ability of open shop contractors to provide a cheaper product and one that can be delivered without concern for labor problems.

The Business Roundtable, whose members comprise a large share of the consumer market for construction work in this country, has been extremely active in studying the problems of union construction and the benefits of open shop.

All of this creates the impression that the growth of open shop construction has been a sort of natural product of the free market system, and has nothing to do with case developments under the National Labor Relations Act, which have, in the last decade, largely transferred from employees to employers the power to determine whether a company's work force will be union or open shop.

I suggest to you that there is a direct correlation between the growth of open shop construction and the deterioration of workers' legal rights in this industry during the last ten years, and virtually no correlation between that growth and any increased economic advantage of open shop versus union construction.

Indeed, over the last 10 years, building trades unions generally, and the International Union of Operating Engineers in particular, have worked tirelessly and successfully to increase productivity and eliminate cost-inefficient practices.

We are proud of our accomplishments in this area, and while we feel that there is more that can be accomplished, it can only be done within the framework of legally enforceable, good-faith collective bargaining.

Our members are willing to do what has to be done to preserve and expand their job opportunities. But they can only do so if their legal rights to negotiate are preserved. These rights are not being preserved.

As I have described, the law has deteriorated to the point that, in many cases, employers are free to unilaterally walk away from their workers, and their collective-bargaining obligations, by merely declaring they are no longer union, either by repudiating their agreements, opening a double-breast or, in cases such as McDowell, doing both; 10 years ago, we all would have thought such actions legally ludicrous. Not so today.

One solution to this dilemma would be to rewrite the statute to establish an entirely separate set of election rules and procedures for the construction industry in order to effectuate the original intent of Congress.

We do not urge such a revamping because a much less Draconian approach is presented by H.R. 281, an approach we support.

H.R. 281 does not revamp the statute to accommodate the construction industry. H.R. 281 simply reiterates the accommodations which Congress has already made, but which the NLRB has effectively written out of the statute.

We urge the speedy passage of H.R. 281. Thank you, Mr. Chairman.

[Prepared statement of J.C. Turner follows:]

PREPARED STATEMENT OF J.C. TURNER, GENERAL PRESIDENT, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Mr. Chairman and Members of the Subcommittee: I am J. C. Turner, General President of the International Union of Operating Engineers, an organization of 375,000 members that has represented workers in the construction industry for the last eighty-nine years. I thank you for the opportunity to appear before you today to present our views on H.R. 281, a bill to restore and preserve the integrity of collective bargaining agreements in the construction industry.

Like President Georgine, I also appeared before you two years ago and described how decisions of the National Relations Board, denying enforcement of prehire agreements and sanctioning the sham of double-breasted contracting, have provided employers with an almost unfettered ability to escape long-standing collective bargaining relationships, defying workers to attempt to reestablish their bargaining rights through the NLRB's election procedures—procedures which have long been acknowledged to be unworkable in the construction industry. The Board's prehire agreement and double-breasted contracting decisions have ignored the special characteristics of the construction industry which require, and which Congress intended be afforded, special accommodation. The National Labor Relations Act is not working in the construction industry. Employee freedom to secure collective bargaining representation, the most fundamental right and promise of the Wagner Act, has been undermined to the point of extinction. We believe H.R. 281 will help restore to construction workers the promise of the Wagner Act and its amendments.

The failure of the NLRB to properly accommodate the Act to this industry with respect to representation issues, stands in stark contrast to its demonstrated interest in conforming its secondary boycott decisions to the special characteristics of the industry. The Board has drawn fine lines when it comes to construction industry picketing. An errant word on a picket sign or a misstep between primary and reserved gates results in immediate action by the Board to secure a court injunction against picketing, and exposes the union to extensive liability for damages. The Board's concern with construction industry recognitional and organizational picketing has been similarly acute.

Building trades unions have for years argued that the Board's picketing rules have unfairly denied to construction workers rights enjoyed by workers in all other industries. Our views on common situs picketing are well documented and I am not here to renew the argument today, although I firmly believe that at the appropriate time it must and will be renewed. My point is that, while the Board has drawn distinctions in its treatment of construction industry picketing versus other industries, when it comes to employee free choice the Board has ignored the characteristics of the industry which require special treatment.

A 1982 case involving the IUOE demonstrates the extent to which construction workers' rights to collective bargaining representation have become a matter of employer caprice under the NLRB's prehire agreement rules. The case involved Operating Engineers Local Union No. 312 in Birmingham, Alabama and McDowell Contractors, Inc.

In 1964, McDowell signed its first collective bargaining agreements with Local 312, covering highway construction performed by the Company within the union's jurisdiction. It was a prehire agreement pursuant to which McDowell was entitled to seek skilled operating engineers through Local 312. The collective bargaining relationship between McDowell and the Local continued unabated for the ensuing sixteen years, expanding to cover building and heavy construction, as well as highway work. In 1973 and thereafter, McDowell assigned its bargaining rights to the Birmingham chapter of the Associated General Contractors of America and became a formal part of the multiemployer bargaining unit included under the AGC's agreement with Local 312.

From 1964 until 1980, McDowell performed many projects under the agreements, secure in the knowledge that whenever it needed operating engineers, they would be available through Local 312. Likewise, workers represented by the Local Union were secure in the knowledge that when McDowell was successful in bidding for work, they would be provided with work opportunities. In short, both sides benefitted from the bargain. But in 1980, all that changed.

In September of 1979, four months after it had renewed its collective bargaining agreements with Local 312, McDowell submitted a bid for grading and paving work on an airport job within the Local's jurisdiction. The bid was accepted. Work was to commence March 1, 1980. In February, Local 312, aware that McDowell had been awarded the airport work, contacted the Company requesting a pre-job conference as provided for in the applicable collective bargaining agreement.

In response to this request, the Company advised Local 312 that, while McDowell Contractors, Inc. continued to have a collective bargaining agreement with the Local, the Company had undergone a corporate reorganization on January 1, 1980 and a new Company called McDowell Materials Corporation had been created. McDowell Contractors, Inc. had then assigned its interest in the airport construction project to the new McDowell Materials Corporation. It was the Company's position that McDowell Materials had no collective bargaining agreement with the union and the job would be performed on a non-union basis. This was a classic case of double-breasting. The Company unilaterally determined to assign work which workers represented by Local 312 were entitled to perform, to workers who were not represented by the union. A simple and easy way to avoid collective bargaining obligations and one which has been encouraged by NLRB decisions.

Local 312, and other construction unions similarly affected, immediately went to court to enforce their rights. While McDowell Contractors continued to argue that McDowell Materials was a separate business entity, not subject to the union collective bargaining agreement, when the case came to trial, the Company added an additional defense. It contended that even if the two companies were a single entity for collective bargaining purposes, under the decision of *Ironworkers Local 103* v. *Higdon Contracting Inc.*, 434 U.S. 335, the Company was entitled to repudiate its prehire agreements prior to the commencement of the airport project. In other words, if we can't strip the workers right one way, we'll do it another.

McDowell's Higdon argument was premised upon the contention that the Company had traditionally secured new employees at the commencement of each new project and thus had not maintained a stable complement of employees. The Company argued that in order for the unions to enforce their agreements on the airport project, they would first have to establish majority support among the employees on this project. This was a marvelously self-serving argument in view of the fact that the Company had already ignored its collective bargaining obligations and secured non-union employees to work on the new project, thereby precluding any possibility of the unions establishing majority support. A self-serving argument and yet, under the current state of NLRB law, valid.

The unions' initial response was that the *Higdon* decision was just plain bad law. But, recognizing that the federal district court had no choice but to attempt to apply Higdon, they pointed out that the hiring hall system is intended to distribute available work among available workers in such a fashion that a stable complement of employees will be the exception rather than the rule. Accordingly, they argued, if majority support were to be the yard stick, that yard stick should be applied to the entire multiemployer bargaining unit of which McDowell had been a part since at least 1973, i.e., all AGC employers bound to the collective bargaining agreement. Since the available work consisted of all work performed by those employers, and the union as bargaining representative had secured the benefits of this agreement for all workers available in the area, majority support should be measured among all workers employed under the agreement rather than merely those on jobs that McDowell had performed.

In response to this argument, the Company cited a decision of the Fifth Circuit Court of Appeals in a case called Haberman Construction, 641 F.2d 351, which had expanded on Higdon. The court in Haberman ruled that even in a multiemployer bargaining unit the union must prove its majority support on a project by project basis. In my view, this expansion of Higdon all but completed the perversion of the 1959 intent of Congress to stabilize collective bargaining in the construction industry by legalizing prehire agreements. Under this rule the employers, not the workers, decide after each project whether collective bargaining representation will continue. I defy anyone to explain to me how such a situation promotes stability or protects employee free choice in this industry.

As was to be expected, relying on Higdon and Haberman, the District Court ruled in favor of McDowell. It was unnecessary for the Court to address the double-breasting issue which had given rise to the case.

The unions appealed to the Eleventh Circuit Court of Appeals. In July of 1982, that Court issued a brief decision affirming the District Court. The Circuit Court felt constrained to follow the law of the Circuit established in the *Haberman* case. (The Eleventh Circuit had at the time of Haberman been a part of the fifth Circuit.) Significantly, one of the three judges that decided the *McDowell* case, Judge Goldberg, a senior Circuit Judge, had participated in the *Haberman* decision. While acknowledging that the McDowell court was required to follow the Haberman precedent, Judge Goldberg felt constrained in McDowell to write a concurring opinion expressing this judicial concern over what Higdon and its progeny Haberman have created in the construction industry. While I readily concede that we of the building trades cannot expect judges to have any special understanding of the unique characteristics of the construction industry, Judge Goldberg's remarks capture with remarkable clarity the dilemma which has been created, and the abject frustration faced by construction unions in its wake. Said Judge Goldberg:

"It is my position that the rule set forth by the en banc court in Haberman leaves those in the construction trades without the effective protections of collective bargaining, nomadic orphans in labor's maelstrom.

"The rule adopted by the en banc court in *Haberman* forces unions to demonstrate majority support at each construction project before they can enforce an area wide pre-hire agreement at that project. I believe that this rule imposes an impossible burden upon the exercise of important rights secured by the National Labor Relations Act." 680 F.2d 94 at 95, 96.

This impossible burden on construction workers' rights was never intended by the drafters of the Wagner Act. Indeed, recognizing that the strictures of both the Wagner and Taft-Hartley Acts impinged on employee free choice in this industry, amendments to alleviate this impingement were grafted to the Landrum-Griffin Act. Chief among those was the amendment authorizing construction workers to secure bargaining representation through prehire agreements. Today, as a result of Higdon and subsequent cases expanding upon it, workers still have the ability to secure representation rights through prehire agreements, but are almost powerless to enforce those rights. This I submit is a travesty.

Confronted with the facts I have just presented, antiunion employers will respond: "What's the big problem. If construction workers want to secure their right to be represented, let them file an NLRB election petition like workers in any other industry." Such response is both facile and totally self-serving, for as everyone, including unions, employers, the NLRB and Congress have long recognized, the National Labor Relations Act's election provisions were not developed for, and are virtually useless in, the construction industry. They provide no alternative for construction workers disenfranchised by the repudiation of a prehire agreement, or a double-breasting scheme.

NLRB ELECTIONS A FUTILE CONSTRUCTION INDUSTRY ALTERNATIVE

The *Engineers Constructors* case described by President Georgine is a perfect example of the futility of NLRB elections as an alternative to enforceable prehire agreements in the construction industry.

On other occasions, particularly during the hearings on labor law reform, the labor movement has presented evidence concerning the inordinate delays in the processing of representation cases under current NLRB procedures, and the damage such delays inflict upon the organizational rights of workers. More recently, in your hearings on union busting labor consultants, you reviewed the evidence of how labor consultants manipulate delays in the processing of representation cases to defeat organizing efforts.

While the evidence in those hearings established the scope of the delays and manipulation and their impact on the rights of workers in all industries, it is beyond peradventure that in the construction industry the delays alone, without manipulation, effectively preclude the possibility of securing collective bargaining representation. The NLRB itself recognized this fact early on.

After the passage of the Wagner Act, and until passage of the Taft-Hartley Act, the Board didn't even try to conduct elections in the industry. The most commonly cited reason for the board's abdication of jurisdiction over the construction industry was stated in its 1943 *Brown and Root* decision, i.e., application of the Act to the construction industry "would not effectuate the policies of the Act." 51 NLRB 820. Indeed, even after Taft-Hartley, which contained amendments specifically directed to the construction industry, the Board's General Counsel advised the Board to ignore the statute in the construction industry for election purposes. (25 Lab. Rel. Rep. 107, 1949.)

At the time everyone, including industry representatives, acknowledged that employment in the industry was too sporadic and transitory for representation proceedings conducted on an employer-by-employer, jobsite-by-jobsite basis to effectively provide collective bargaining representation.

Another case involving the International Union of Operating Engineers provides an excellent example of the frustration encountered by construction workers who attempt to secure union representation through the NLRB's election procedures. In 1981, the S. J. Groves Company of Minneapolis, Minnesota commenced work on two very large Interstate highway projects in downtown Atlanta, Georgia. The International Union of Operating Engineers is familiar with the Groves Company because it has been a major national heavy and highway construction firm for many years. In my experience, until these Atlanta projects, Groves worked throughout the country as a union contractor, and prospered as such. At the present time, the Company enjoys mutually beneficial collective bargaining relationships with a number of IUOE local unions around the country. In spite of these long-standing relationships, when approached by construction unions in Atlanta concerning the two Interstate projects, Groves advised that they intended to perform the work on a non-union basis, and refused to negotiate a collective bargaining agreement. Because of the unusual magnitude and duration of these projects, the unions determined to attempt to secure an NLRB election for the workers involved. It is estimated that the two projects would cost one hundred and twenty-five million dollars and take approximately three and a half years to complete. Such a time frame makes an election petition at least worth a try, even though it is recognized that a contested NLRB case with appellate review can take much longer than a mere three and a half years.

Soon after the Atlanta jobs began, IUOE Local 926, as well as four other building trades and Teamster local unions, began organizing. The Company responded with what has become an increasingly normal employer reaction to employee attempts to organize: unfair labor practice activity aimed at intimidating and coercing the workers into rejecting the union. From the outset of the organizing drive, the Company engaged in acts of surveillance, interrogation, threat and reprisal which the General Accounting Office's 1982 report to this Subcommittee showed to be cost effective law breaking from the employer's standpoint. Suffice it to say that the unions filed a series of unfair labor practice charges on behalf of the workers which resulted in a formal settlement by Groves in which it agreed to cease and desist all such unfair labor practices and make whole the affected employees in the amount of $22,000.

In March of 1982, the five local unions filed a joint election petition with the NLRB. In response to this petition, the Company filed with the Board a list of its employees, which allegedly demonstrated that the unions' petition was not supported by a sufficient showing of interest, i.e., 30% of the employees in the bargaining unit.

The unions had requested an election in a unit consisting of all operating engineers, carpenters, cement masons, laborers, and teamsters on the two Interstate projects, and the central garage facility which serviced the jobs. While the unions estimated that approximately 120 employees were encompassed in the unit, the employer's list included well over 200 names. Accordingly, on March 26 the Board's Regional Director dismissed the petition for lack of a 30% showing of interest.

Four days later, the unions filed another petition, excluding the teamsters and the central garage from the requested unit. This time, the Regional Director found that there was a sufficient showing of interest and directed that a hearing be conducted on the petition. That hearing was held on April 20, 1982 and the employer raised all of the issues that are common to construction industry cases. For instance, the employer argued that the unions' petition should be dismissed because the two project unit was narrow, and should have included thirteen other small, short-duration jobs being performed by the Company in the area. This argument is made, of course, to dilute the unions' established support and force them to secure authorization cards from workers on widely scattered job sites. Of the thirteen additional projects all had anticipated completion dates in 1982, which of course meant that by the time an election might be expected some, if not all, of the work would have been completed, and the workers widely scattered. And let me assure you that if the unions' original petition had included all of those small projects, the employer would have gone to the hearing and argued that since the small jobs were of limited duration and presented no prospects for continuing employment, their inclusion by the union required dismissal of the petition.

The Company also asserted a number of other arguments. They contended that the work performed by the construction employees was not sufficiently segregated by function to identify the workers along craft lines. The usual arguments concerning the inclusion or exclusion of supervisory personnel were also made. Where the union argued for exclusion the Company argued for inclusion and vice versa.

It's a game, we recognize that. It's a game played under NLRB rules stacked against workers in all industries, but in our industry we don't have time to play because, by the time the game is over, the work is also over and our people are unemployed.

On June 21, 1982, two months after the close of the hearing, the Regional Director issued a decision holding that the unit in this case must include the thirteen small projects, in addition to the two Interstate projects. The unions accepted this setback and immediately gathered enough additional authorization cards to proceed with an election in this expanded unit. The election was set for July 16, 1982.

The Company, however, was far from through. Although it has prevailed in its argument that all fifteen jobs should be included in the unit, the Regional Director had rejected the Company's argument that all employees, not just the specified craftsmen, should be included in the unit. Since the Regional Director had accepted some, but not all, of Groves' position, the door was left open for the Company to file a Request for Review with the Board in Washington, asking that the Regional Director's decision be set aside. This the Company did. While that Request for Review was pending, election preparations progressed. But, on July 15, the eve of election day, the parties received a telegram from Washington advising that the Board had granted the employer's Request for Review and directing that the election be postponed until further notice. The Board then promptly did nothing with the case for over a year.

In August of 1983, eighteen months after the original election petition, the Board issued a decision holding that in order for the unions' petition to be valid it would have to include not only all fifteen Groves projects, but also all craftsmen employed on the projects, not only the four crafts which had been petitioned for. Needless to say, this decision was impossible to comply with since all but two of the fifteen projects had long since been completed and only small work forces remained at those two. Once again, construction workers were caught in an NLRB Catch-22, created by the total incompatibility of the Act's election procedures to the realities of the construction industry. And it is this incompatibility, and its resulting futility, which entices employers to escape from their collective bargaining agreements by taking advantage of the Board's double-breasted and prehire agreement decisions. The employers know that if they can escape from their valid agreements by unilaterally repudiating them or forming a sham double-breast, the unions will never be able to reorganize the work forces through NLRB elections—it simply cannot be done.

CONCLUSION

Anti-union employers and employer groups take great satisfaction in publicizing the vast increase in the number of open shop contractors over the last decade. They attribute this growth to the ability of open shop contractors to provide a cheaper product and one that can be delivered without concern for "labor problems". The Business Roundtable, whose members comprise a large share of the consumer market for construction work in this country, has been extremely active in studying the "problems" of union construction and the benefits of open shop. All of this creates the impression that the growth of open shop construction has been a sort of natural product of the free market system, and has had nothing to do with case developments under the National Labor Relations Act, which have in the last decade largely transferred from employees to employers the power to determine whether a company's work force will be union or open shop. I suggest to you that there is a direct correlation between the growth of open shop construction and the deterioration of workers' legal rights in this industry during the last ten years, and virtually no correlation between that growth and any increased economc advantage of open shop versus union construction. Indeed, over the last ten years building trades unions generally, and the International Union of Operating Engineers in particular, have worked tirelessly and successfully to increase productivity and eliminate cost inefficient practices. We are proud of our accomplishments in this area, and while we feel that there is more that can be accomplished, it can only be done within the framework of legally enforceable, good-faith collective bargaining.

Our members are willing to do what has to be done to preserve and expand their job opportunities. But they can only do so if their legal rights to negotiate are preserved. These rights are not being preserved. As I have described, the law has deteriorated to the point that, in many cases, employers are free to unilaterally walk away from their workers, and their collective bargaining obligations, by merely declaring they are no longer union—either by repudiating their agreements, opening a double-breast or, in cases such as McDowell, doing both. Ten years ago we all would have thought such actions legally ludicrous. Not so today.

One solution to this dilemma would be to rewrite the statute to establish an entirely separate set of election rules and procedures for the construction industry in order to effectuate the original intent of Congress. We do not urge such a revamping because a much less draconian approach is presented by H.R. 281, an approach we support. H.R. 281 does not revamp the statute to accommodate the construction industry. H.R. 281 simply reiterates the accommodations which Congress has already made, but which the NLRB has effectively written out of the statute.

We urge the speedy passage of H.R. 281.

Mr. Clay. Since you testified before this subcommittee two years ago on essentially the same subject as today's hearings, how would you describe the day-to-day labor relations in this industry?

Mr. Turner. They have drastically deteriorated. I would say that more and more, the building trades unions have absolutely no protection of the law. In fact, we would be a lot better off, I believe, if we could be back to 1932, and if all we had was the Norris-LaGuardia Act, the anti-injunction provision.

In the Wagner Act, they never applied it to the building trades, the construction industry. After 1947, Taft-Hartley didn't do much with that, either, for a number of years, and of course, in 1959, we got the Landrum-Griffin Act, which is to permit the building trades to function, to act, to work under the law, but that, of course, has not helped at all.

And so, what has been happening is that legislation has been, is being used to weaken the building trades unions.

Back as a kid, down in Texas, going to Beaumont High School, I took a course in commercial law, and the teacher said, "Now, the first principle of contract law is that there must be a meeting of the minds, before there is a contract."

Yet, all over the United States, our unions meet with employers. They sit down and quite soberly sign a contract and they said, "Well, now we have got an agreement with that employer."

They and the employer, they think, they have a meeting of the minds, but the employer turns around, as McDowell did, and he gives the job to some other subsidiary, which he has pulled out of a hat.

It is a very, very unfair situation. People like myself and my father before me, who spent their entire lives in the construction industry are now wondering if this is not a bum industry to work in, with the kind of actions that are occurring without any help at all from the government.

In fact, the law is being used all the time to keep the unions out. It is as if the law were passed for that purpose.

Mr. Clay. If this trend continues, how do you see labor relations in the construction industry, say, 2, 3 years from now?

Mr. Turner. I see them deteriorating even further. I see a lot of very difficult situations. I see a lot of clashes occurring between labor and management. I see a more aggressive and more militant—union movement—we always get action and reaction.

With the kind of tactics that are being used against the construction worker, I think the people—are going to be more strikes, more work stoppages.

I would predict a great deal more friction than there is today.

Mr. CLAY. Are there any positive experiences that you have had in dealing with contractors?

Mr. TURNER. We have an agreement on nuclear power which is a national agreement, which has worked out very well. We have a number of national contractors who don't have double-breast, and, or if they do, it is very, very minor, and these national contracts have been very helpful.

They have led to stable labor relations. We have some very large contractors who do all kinds of work. Whether it be building, heavy commercial or public buildings, et cetera, and they don't do any nonunion work anywhere, but they are diminishing.

Their numbers are diminishing, and the law seems to have been—is made to order for anyone who wants to destroy the building trades industry, that is, the unionized part of it.

We have lost a great deal, and we are going to continue to lose if we can't get some kind of opportunity to be treated fairly in the same way as all other workers.

We are being left out of the law.

Mr. CLAY. Thank you.

Mrs. Roukema.

Mrs. ROUKEMA. Thank you, Mr. Chairman.

I noted with interest your reference to the Business Roundtable, the fact that the business community considers the growth of open shop construction a natural development of free market systems.

I understand that you do not agree with that, but I would suggest that there is a component here of reality that we must face as we are looking at the question of whether or not to change the law, and that is, to ask ourselves what would be the effect on new construction firms just entering the market, or those that have been well-established who are trying to remain competitive in their bidding positions? What would be the effect on them of the passage of this law?

It would seem to me that it would make them more and more reluctant to go into union agreements. Don't you foresee that as a possible consequence of this legislation?

Mr. TURNER. Well, in my experience, it didn't happen that way before, and they put their money and the organization into a union relationship, and it worked quite well.

I think that this kind of a law, of course, encourages them to form open shop companies, but there is nothing really to stop them from being completely nonunion if they want to be.

If they want to start out to be a nonunion company, they have that privilege, but if they want to sign a union contract, then the contract ought to provide coverage and support and protection for the employees under the law as it provides protection for all other workers, but it doesn't.

I would say that the thing we object to is that he says here is a union contract, or you think you have a meeting of the minds with him, you sit down with him or his representative, you sign a contract and say, well, we got a relationship, like a marriage.

Then you turn around and it is not that way. He is going to have other companies. He all of a sudden says, well, I am going to start another company over here, which he never talked to you about when you made the contract, and he goes out, just like this case in Alabama here is a contractor—goes along—McDowell, for years a union contract, great relationships, and then all of a sudden, he decides that he is going, he bids this job, he meets with the union—as a matter of fact—312.

They sat down and had a prebidding conference, and said this is the way it is going to be. The contractor knew exactly within limits what the union contractor range of bidding would be, and he turns around and he bids it with this nonunion company, and with that company, he does the job, but the union, it is like, well, I don't know.

I could give you so many examples where people sit down and make contracts. I don't know how in the world the Supreme Court or the NLRB could ever come to the conclusion that the construction industry, of all industries, was an industry where there didn't have to be a meeting of the minds for there to be a contract.

Not being a lawyer, perhaps that is why I can't understand it, but I don't believe that is the reason.

Mrs. ROUKEMA. Well, since I don't know enough about them, I am not either condemning or exonerating the McDowell Co. which you spoke of, but I do suggest that there are some economic forces working here that are changing the relationship between unions and the employees, particularly in the construction industry and in other industries, and double-breasting is a symptom of something, I suppose.

And I am not quite sure that writing a piece of legislation is going to get at the endemic problem of the industry in terms of coming in with competitive bids and meeting to costs in the marketplace for both labor and construction.

And I guess that is the question that is open-ended in my mind, and that I would have to address in more depth. Would you like to comment on that?

Mr. TURNER. History is completely opposite to what you say. I look back to 10 years ago, when I think on commercial, private, commercial construction, public construction, and I am not talking about individual houses, perhaps 80 percent of the work was being done on a union basis 10 years ago.

Today it is right around 50 percent. The primary reason for that fact, in my opinion, is the kind of unfair advantage, the fact that people can just sit down and lie, sit down and lie and then tell someone they are going to shake hands, sign a contract and turn around and start up with another company.

It is like some guy who gets married and says, "I am going to be true to my wife," and the next day he goes out with another woman and spends the night with her. It is very comparable.

Mrs. ROUKEMA. I understand that, and that is why I took pains to say I neither condemn nor condone the actions of some of these companies. I do not condone those circumstances where a company may go back on its word or even an agreement that they had.

That to me is not the issue. That is clear. There are clear avenues for collective bargaining and for reaching those agreements and they should be honored by all concerned.

Mr. TURNER. That is why we are here, because they are not being honored.

Mrs. ROUKEMA. That is an open question, whether there are market forces here that are permitting them to take advantage of a system that is permitted under the law. My question to you is, if we rewrite the law, it may not only put business at a competitive disadvantage, but it may also actually mean fewer contractors will deal in collective bargaining, prehire agreements.

That is the open question in my mind.

Mr. TURNER. We would like to have that opportunity.

Mrs. ROUKEMA. OK; thank you very much.

Mr. CLAY. Mr. Dymally.

Mr. DYMALLY. No questions.

Mr. CLAY. Mr. Armey?

Mr. ARMEY. When McDowell did the contracting work down in Alabama, they apparently did hire a crew of workers, right?

Mr. TURNER. This new company did hire some workers.

Mr. ARMEY. They must have hired enough workers to satisfy themselves that they had enough to do the job?

Mr. TURNER. I assume so.

Mr. ARMEY. Do you think they would have hired fewer workers had they been in a prehire agreement?

Mr. TURNER. They violated a contract to employ people at a given rate of pay and paid them a much lower rate.

Mr. ARMEY. How many workers do you think they hired?

Mr. TURNER. I don't have the answer. I don't know.

Mr. ARMEY. 50, 100?

Mr. TURNER. On an airport excavating job, I would say 100.

Mr. ARMEY. In this case, they have 100 separate meetings of the mind with this worker and that employer, instead of one meeting of the mind, which they would have had if it had been a collective bargaining agreement, so as you mentioned there has to be a meeting of the mind.

You had more meetings of the mind with 100 separate such instances. Do you have any idea whether or not those workers that were hired were union members?

Mr. TURNER. I assume they were not union members.

Mr. ARMEY. So that indeed where you say defy me to demonstrate that somebody's rights were protected, we could say that there were 100 workers who chose not be a member of a union and still be employed who had their right to do that protected by this arrangement?

Mr. TURNER. We have a case where a contractor in effect tore up a contract, did it successfully and violated the promises he had made to that union in terms of what he was going to pay for the work he was going to do.

You know, it is just a question of integrity. Is the law going to support people who have no integrity? Or is the law going to support integrity?

Mr. ARMEY. What they did was perfectly legal, you agree with that?

Mr. **Turner**. I don't think it was legal. The NLRB said it was legal, but I don't agree.

Mr. **Armey**. I am starting to get a focus on this problem. In 1964, McDowell entered into a prehire agreement, right, for a project, and subsequently, until 1980, repeated that process for additional projects?

Mr. **Turner**. He went into one project and expanded his business to include not only highway workers, I understand from the record, but to include heavy construction work and airport work.

Mr. **Armey**. By 1980, he entered into, or began a new project, and in this case, chose not to have a prehire agreement?

Mr. **Turner**. 1980, he sat down with the union in the same way as he had sat down with his other, on his other projects, to have a prebidding conference on large jobs.

That is a practice of contractors on large jobs. He talked about the rates, the conditions and he bid the job. The union thought that the job was union—that everything was fine. They had made certain concessions on the job, but lo and behold, he turns the job over to a nonunion company.

Mr. **Armey**. It was a different local in a different State with no prior experience——

Mr. **Turner**. No, same local. Birmingham Airport.

Mr. **Armey**. You say in 1980, things kind of fell apart. Are there fewer people hired and employed in this industry now than in 1980?

Mr. **Turner**. I have no idea.

Mr. **Armey**. Essentially, what you are seeing is, since 1980, depending on the work to be done, there are still people being hired, but it is just that people are choosing now to deal directly and individually on negotiations.

Mr. **Turner**. Except that people are being denied the right to bargain collectively and to form a union and to have a contract that is enforceable.

Mr. **Armey**. I don't understand that.

Mr. **Turner**. They have been denied their right by the ruling of the NLRB that the contractor could violate his word, violate his signed contract and do a job with another company in violation of that contract.

Mr. **Armey**. Well, we have already established that McDowell——

Mr. **Turner**. No, no, you haven't established to me, maybe yourself, but not to me.

Mr. **Armey**. McDowell sold its interest in that contract to another company.

Mr. **Turner**. McDowell came up with a shell game which he used on the union successfully.

Mr. **Armey**. Which was to alleviate themselves, the presumption of ongoing responsibility to continue project after project from 1964 until any time in the future, essentially.

Mr. **Turner**. The whole thing was a sham.

Mr. **Armey**. I have one more question. I am sorry I have to leave. If this law is passed, will this then make it imperative that a firm enter into prehire agreements?

Mr. **Turner**. No, sir.

Mr. Armey. This will not change?

Mr. Turner. No, sir.

Mr. Armey. Firms can in the future choose not to make prehire agreements on that project or that project?

Mr. Turner. They could choose not to make any contract on anything with anybody.

Mr. Armey. On a project-by-project basis or if they have done it historically, will they be presumed to be responsible to continue it for future projects?

Mr. Clay. Will the gentleman yield on that point?

Mr. Armey. Yes, sir.

Mr. Clay. It is my legislation, so I ought to perhaps clarify what the issue is here. First of all, the agreements don't run from project to project, but they run for a certain period of time. There is nothing compulsory about a contractor refusing not to renew the agreement, the prehire agreement.

What we are trying to clarify in the law is that once he signs a legal contract, then he ought to be obligated to fulfill the terms of that contract, and it has nothing to do with how many people are hired, union or nonunion.

We are saying if they enter into a legal contract, it ought to be legally binding, and they should not be able to get around it by creating another company for the purpose, exclusively, of getting around their agreement.

They don't have to sign the agreement. Once they sign it, the law ought to protect both sides in that agreement.

Mr. Armey. Well, I have to go to another meeting. I do have the written testimony of the other witnesses. I will read it, and like I said, I find this a fascinating discussion. I do regret having to leave, but I will follow up on this.

I appreciate your time and interest.

Mr. Turner. Thank you.

Mr. Clay. Mr. Bartlett.

Mr. Bartlett. I apologize for coming in late. I have reviewed the written testimony, though.

Mr. Turner, let me see if I understand essentially what you would propose in layman's terms. Would the results of H.R. 281 be that if a firm or company has a union agreement, and finds itself unable to bid on a particular job competitively under union scale, and if they were required to bid under the union shop and if they were not competitive, therefore, they wouldn't get the job.

My concern is for your workers. Wouldn't that mean fewer contracts that those firms would obtain, and therefore, less work and fewer jobs for your workers? Isn't that the case?

Mr. Turner. Collective bargaining in the construction industry over the last 50, 75 years has been that, until this double-breasting got in the picture, was that you had a contract with a contractor.

You negotiated a contract with him, covering the wages, hours, working conditions of the workers, and the contractor bid competitively against his competition to get the job.

As part of bidding the job, he had contracted with a union that, over a period of time, he would pay a certain pay and certain conditions, and if he got the job, why then, the workers got a job.

If he didn't get the job, they didn't have a job. Of course, what is happening here now is that unions many times sit down, try to cut costs, try to get down to a figure and then they sit down and have a prebidding conference with the contractor.

The contractor turns around and bids the job with some other legal entity which they have never heard of, the union never heard of, which is a way of denying those job opportunities to the workers.

We feel that construction workers are not unlike any other workers, and that when they make a contract with their employer, under the law which sets up procedures for collective bargaining, with that certification, that they are going to represent the workers, it should be just as valid as any other contract.

Mr. **Bartlett**. The people who are denied the job are the workers of a company that doesn't get the job, and if the company is outbid, your workers suffer, don't they?

Mr. **Fanning**. I am general counsel at the International Union of Operating Engineers. There is nothing in the law as written now, nor as it would be modified by this bill, that prohibits midterm modifications mutually agreed upon by the parties, so if your hypothetical is that the agreement is going to render the contractors noncompetitive and deny to the union employees the ability to secure the work, then certainly, the union as the representative of the workers is free to mutually with the contractor modify the contract midterm.

The purpose of this bill is to stop this unilateral modification by contractors midterm which is allowed through this sham of double breasting, and this simple repudiation of prehire agreements.

Mr. **Bartlett**. H.R. 281, as I understand, would overturn the policies that were established in the mid-1970's, or in the seventies, by the Supreme Court and the NLRB. The first call for changing those policies was somewhere in 1983, and now again in 1985.

If those policies were objectionable, why has it taken so long for you to raise the issues and to ask that those policies be overturned?

Mr. **Turner**. We have been raising the question for at least 4 or 5 years, in the building trades unions, and of course, this decision was 1979?

Mr. **Fanning**. Higdon was 1978.

Mr. **Turner**. These kinds of decisions made us aware of what was happening, and we had to try to find some legal way to see to it that we could be restored in terms of our collective-bargaining rights.

Mr. **Bartlett**. What effect would H.R. 281 have on the common situs debate, that is, to the extent that H.R. 281 would consider all entities under common control as a single employer, would that allow common situs picketing?

Mr. **Turner**. It would not have any effect on common situs, but I would defer to our attorney.

Mr. **Fanning**. There is a suggestion in the testimony of one of the other witnesses that the subcontractor-contractor relationship on a job site would be sufficient control by the contractor over the subcontractor to subject the subcontractors to the single employer definition contained in this statute, in the bill.

We certainly don't read the bill that broadly, and don't think that that is the control that the bill refers to that would be sufficient to define both the contractors and the subcontractors on the job site as a single employer.

Mr. **Bartlett**. It is not your intent to use this as a vehicle to prevent common situs picketing?

Mr. **Fanning**. Absolutely not.

Mr. **Bartlett**. What would the effect be on two entities under common ownership but whose employees were already represented by the two different unions? Would that require a three-way negotiation?

Mr. **Fanning**. I think that is a troubling question, frankly, and I think that the bill would not require the substitution of one bargaining representative for another, if the second entity already has a union agreement with another union.

In fact, that is a very, very unique case, and one that I have never seen. The common situation is the union employer with a union contract opens up a new corporation to avoid the union contract and in opening up the new business, this bill would require ab initio, at the point he opened up the new business, application of the existing contract. And so you don't see a situation where you have two competing unions representing both sides of this entity.

Mr. **Bartlett**. On the broad scope of the bill, Mr. Turner, I understand that you are in favor of H.R. 281. Is H.R. 281 a serious legislative attempt in the sense that you expect to pass it this session? Do you expect this committee to pass it out and send it to the floor?

Mr. **Turner**. We understand there are now 113 cosponsors. I would think that is rather serious, Congressman.

Mr. **Bartlett**. How alarmed should those of us who don't agree with it be? You say we should be very alarmed, somewhat alarmed?

Mr. **Turner**. Sir, I hope we will persuade you to support us.

Mr. **Bartlett**. I have some concern for those employees who are left out, frankly, those employees who would not have jobs as a result of a change in the law which would cause some contractors to be noncompetitive and, therefore, not get the job at all. Those employees would be left essentially unemployed.

Mr. **Turner**. You left me somewhere, Congressman. I don't follow that at all.

Mr. **Brown**. I am Johnny Brown, legislative director, and we have a dear colleague letter that has been put out by members of both parties. This is not a partisan support. We have both Republican and Democratic signees to a dear colleague letter so there has to be support from both sides of the aisle.

Mr. **Bartlett**. Should this reach the floor—and this question may take you more than just this session to answer—you may need to think about it some, I wonder if you would consider in this legislation or other legislation supporting some sort of employees' protection legislation that would guarantee to employees of this country the right to a secret ballot vote in all cases: To whether to be represented or not, and whether to accept or reject a contract or not, particularly when the acceptance or rejection means their jobs. I wonder if your organization would consider accepting a secret ballot requirement so in all cases employees are entitled to a secret ballot on whether or not they are represented and whether or not to accept a contract?

Mr. TURNER. I would say about 80 or 90 percent of them are secret ballots, Mr. Congressman, in our union. It runs about that.

Mr. BARTLETT. First, would you consider protecting the other 10 percent?

The second question is, we might have to come to some agreement on what the facts are. It seems to me that a large number of acceptance or rejections of contracts are not secret ballots. They are done in a large hall with a show of hands and there is a fair number of representative decisions made, that is to say, whether to be represented by a union local, or by telegram and petition.

Mr. TURNER. Many of them are done by referendum in large local unions, many done by secret ballot in a meeting hall. It varies as to what the contract is and the situation. I would have to see in writing, sir, your point that you are making before I could respond very readily to it.

Mr. BARTLETT. That is a fair answer.

Thank you, Mr. Chairman.

Mr. CLAY. Any further questions?

If there are no further questions, we want to thank you for your testimony.

Our next witness is Mr. Robert Fay, president and treasurer, Joseph B. Fay Co., representing the Associated General Contractors, and Mr. Charles E. Murphy, Esq., of Vedder, Price, Kaufman and Kammholz, and Mr. Peter Nash, Esq., of Ogeltree, Deakens, Nash, Smoak and Stewart.

Welcome to the committee. Without objection, your entire statements will be included in the record.

STATEMENTS OF ROBERT FAY, PRESIDENT AND TREASURER, JOSEPH B. FAY CO., REPRESENTING THE ASSOCIATED GENERAL CONTRACTORS, ACCOMPANIED BY CHARLES E. MURPHY, ESQ; AND PETER NASH, ESQ., AND MICHAEL A. TAYLOR OF OGLETREE, DEAKENS, NASH, SMOAK AND STEWART

Mr. FAY. Mr. Chairman, and members of the subcommittee, my name is Robert Fay. My firm, the Joseph B. Fay Co., is a building and heavy construction company which employs members of several building and construction trades unions. My firm operates in western Pennsylvania. I am here today representing the Associated General Contractors of America.

My oral presentation will be an abbreviated version of AGC's written statement which has been provided for in the record. As an appendix to my verbal testimony, I request permission to add a written statement prepared by AGC's legal counsel Charles Murphy, an attorney with Vedder, Price, Kaufman and Kammholz. He is with me today.

Mr. CLAY. Without objection, the statement will be included, too.

Mr. FAY. Thank you.

AGC has grave concerns with the provisions of H.R. 281 from both a practical and legal perspective. The bill is an attempt to lock collective bargaining contractors into the union market by the extension of the terms of a collective bargaining agreement to independent business entities and its employees.

The practical impact of a successful legislative effort, with at least 70 percent of the market share now open shop, will be the virtual erosion of the unionized market share. With the rapid change in markets in recent years, the most likely business decision a contractor will make in response to H.R. 281 is to become an open shop contractor, exclusively. We are already witnessing that experience where unions have negotiated or attempted to negotiate antidual shop clauses in local collectively bargained agreements.

Today there are open shop firms which periodically perform work on a union basis either under their own name or through another separate business entity. Passage of H.R. 281 will eliminate the union option and reduce employment opportunities.

Union contractors, already concerned over the noncompetitive nature of their operations, will leave multiemployer bargaining units to avoid a commitment which is inconsistent with market trends.

Union construction companies under the provisions of H.R. 281 would be prevented from investing in the open shop marketplace. That limitation will not prevent any other company or individual from investing in an open shop firm to do business in the expanding open shop market. I fail to see how an investment limitation on union contractors will prevent further erosion in the union's share of the contracting market.

H.R. 281 would also deny the employees of an independent, separate employer the right to join or not join a union by imposing the terms of a collective bargaining agreement upon them.

As a contractor who operates with collective bargaining agreements, there is nothing I would like more than to increase my market share. But it cannot simply be done through legislation. It can only be done through joint labor-management responses to market realities.

Let me for a few minutes recap the method we, management and labor in western Pennsylvania, use to meet the challenge of a free market.

Historically, union contractors had been awarded the vast majority of Penn DOT projects. However, in 1982, collective bargaining contractors were performing slightly more than half of those projects.

After enduring a 17 month strike with one of the unions, members of the Constructors Association of Western Pennsylvania, an AGC chapter, recognized that a different approach was necessary. The contractors and the six unions established a joint labor-management committee based on the need to have a vehicle, other than negotiations, to communicate. The committee maintained a relatively informal atmosphere, which facilitated a willingness to speak freely on important issues.

The contractors, in response to shifts in the marketplace, began to assemble facts which documented the loss of work to collective bargaining contractors. This documentation consisted of identifying those projects performed by collective bargaining and by open shop contractors.

The unions were presented with these market facts through the joint labor-mangement committee, the unions then began to work with their employers to modify collective bargaining agreements during contract negotiations in an effort to remain competitive.

Union representatives raised certain issues at committee meetings, however, which led the contractors to believe that the unions and their constituents were not aware of, and did not understand, many of the problems facing construction companies.

The contractors responded by holding a seminar for union officials in which they learned how a construction firm operates. At the end of the seminar, the union officials acknowledged that they had a much better understanding of the problems that contractors face and that the unions needed to take action to effect some necessary changes.

The joint labor-management committee decided to use the same approach which succeeded with the union officials; they established an ongoing seminar program for union building tradesmen. The program, commonly known as the "bidding game" is entitled "Construction: Opportunities and Risks."

Approximately 100 union construction workers attended each session and were divided into 5 person "firms". Each "firm" was given a simplified financial sheet, overhead cost figures and a cost summary of the respective "firm's" prior projects. The competing "firms" were then given 20 minutes to bid on a described project.

The contract for the project was awarded to the low bidder. The "contractor" then drew a "job progress card" for each week of the project. The cards, which were based on actual projects, impose various delays and productivity problems and help determine whether the "firm" would make a profit. The objective of the simulated conditions was to make union members and leaders aware of market realities and factors which dictate success or failure.

After completing the workshop, each participant was given an evaluation from in which comments were sought on every aspect of the game and the entire program. Out of the first 1,200 tradesmen that attended the workshop, only four provided negative feedback. To date, more than 3,000 building tradesmen have attended the seminar in western Pennsylvania alone.

Most important are the results of the program in western Pennsylvania. The contractors and six unions negotiated competitive collective bargaining agreements which increased work opportunities significantly. The agreements became effective December 31, 1983, and by the end of 1984, collective bargaining contractors had increased their share of Penn DOT work by 21 percent. This 21 percent increase represents more employment opportunities for union members.

To obtain work in today's construction marketplace, a contractor must be competitive regardless of labor policy. The unions' ability to secure employment for their members is directly related to the ability of collective bargaining contractors to obtain work. Unions that are willing to work with management to negotiate competitive collective bargaining agreements with the contractors who employ their members need not resort to restrictive legislation such as H.R. 281 to attempt to provide employment for their members.

AGC's western Pennsylvania chapter members and the six building trades unions have proven that.

H.R. 281 must be rejected.

Thank you.

[Prepared statement of Charles E. Murphy follows:]

PREPARED STATEMENT OF CHARLES E. MURPHY, VEDDER, PRICE, KAUFMAN & KAMMHOLZ, CHICAGO, IL

I. This bill is not an effort to legislate what Congress intended in enacting section 8(f) in 1959. It is an attempt to prohibit legitimate business relationships which Congress expressly approved in 1959.

The sponsors of HR 281 have claimed that the bill is necessary to "restore" what Congress actually intended in enacting Section 8(f) in 1959, and to overrule NLRB and Court decisions which are characterized as erroneous interpretations of the NLRA. These statements stand reality on its head. This bill is an unprecedented effort to rewrite labor law as it applies to the construction industry to provide construction union security.

First of all, Congress, in enacting the Landrum-Griffin amendments in 1959, expressly rejected proposed amendments to the Act which would have achieved precisely the major objective of HR 281. Thus, Senator Kennedy on August 28, 1959 introduced a resolution (SR 181) to amend the then pending Landrum-Griffin Act to protect a construction union's right to picket and to seek union subcontracting restrictions applicable to joint ventures and to employers who "are under the same ownership and control." II 1959 Legis. Hist. 15906. This resolution was not adopted and the Landrum-Griffin bill was enacted without the proposed expansion of the rights of construction unions as proposed by Senator Kennedy.

On September 3, 1959, Senator Morse introduced a bill to amend the Landrum-Griffin bill which by then had been reported out of the Senate-House Conference. Mr. Morse's bill would have expressly extended the right of construction unions to picket and to seek restrictive subcontracting agreements applicable to "joint ventures, co-contractors" and to all "businesses doing business with one another when one is commonly owned or controlled by the other or is owned or controlled substantially in common." II 1959 Legis. Hist. 16396.

Again, Mr. Morse's proposals were not adopted and the Landrum-Griffin bill was passed with no changes from the conference bill by a vote of 95—2. II 1959 Legis. Hist. 16435.

A clearer expression of Congressional intent cannot be imagined. Congress did not intend, in enacting the Landrum-Griffin Act, to interfere with the right of owners of construction companies to invest in or organize separate companies, the same rights which are possessed by individuals who participate in all other businesses in this country.

HR 281 perverts the actual intent of Congress in enacting the Landrum-Griffin Act through the device of extending the labor agreement to all other entities in which a contractor has any ownership interest or control. The other business entities potentially affected by this law may be engaged in totally different segments of the construction market, e.g., commercial vs. residential, or different segments of the same trade, e.g., carpentry work vs. flooring installation. Under HR 281, the employees of all separate companies are lumped together in one bargaining unit, even though they may have no community of interest whatsoever between and among themselves. The NLRB over the years has developed a considerable body of law defining when employees in one bargaining unit may have sufficient contacts and relationships with the employees of another unit so as to constitute a single appropriate bargaining unit. HR 281 throws away all of these precedents and legislates a common bargaining unit no matter how different or disparate the interests of the employees involved. In the final analysis, it is the employees' rights which are trampled by this bill. They are effectively denied any voice as to whether they wish to be represented for the purposes of collective bargaining or who that representative will be.

A final note on this subject—to the extent that contractors may have tried to avoid their responsibilities under collective bargaining agreements by shutting down their union operations and establishing a non-union company with the same personnel, customers and business, existing remedies are more than adequate to protect the rights of unions and their members. Such sham operations, nothing more than disguised continuances of the union business, have always been unlawful. The NLRB reports and arbitration decisions are full of cases in which unions have successfully foreclosed the continued operation of the sham alter ego company on anything other than a union basis.

This legislation is not needed to cover the sham operator—existing law provides ample weapons to combat this abuse. Instead, this legislation would prevent the bona fide union contractor from investing in or having anything to do with a totally separate and distinct company which happens to operate on an open shop basis anywhere in the country. The labor laws, both before and after Landrum-Griffin, have always recognized the fundamental freedom to engage in business. No real reason exists today to restrict the right of construction management to engage in any lawful business which serves a function or need in the marketplace.

II. H.R. 281 changes 8(f) prehire agreements into full-fledged binding collective bargaining agreements which may be dislodged only if the employees vote to decertify the union in an NLRB election. Congress in 1959 expressly limited the legal effect of entering into section 8(f) prehire agreements, and H.R. 281 seeks to do away with those limitations.

Congress, in the Landrum-Griffin Act in 1959 enacted certain special rules applicable only to the construction industry. In all other industries employees and unions were barred from entering into collective bargaining agreements until a representative complement of employees had been hired and a majority of those employees had demonstrated their desire to be represented by a particular labor organization. A limited exception to this general rule was made for employers and unions in the construction industry. Under Section 8(f) of the NLRA, a construction employer could lawfully "make an agreement" with a construction union with four specified attributes: (1) the union did not have to establish majority status among employees; (2) employees could be required to join the union no sooner than seven days after being hired; (3) the contractor could agree to accept referrals from the union; and (4) employees could be selected based on their possessing certain training, prior experience, or prior service with the employer. The last sentence of Section 8(f) made it clear that Congress did not intend 8(f) agreements to be the same as full-fledged collective bargaining agreements entered into after employees had chosen to be represented by the union. Thus, 8(f) agreements were expressly not made a bar to any other union filing a petition with the NLRB for an election to determine whether the employees wished that union to represent them, rather than the union which was party to the 8(f) agreement.

The legislative history of Section 8(f) cited by the NLRB in its decisions on this subject and affirmed by Supreme Court in the *Higdon* case (*NLRB* v. *Iron Workers Local 103*, 434 U.S. 335, 54 L.ED.2d 586 (1978)) make it clear that Congress intended to permit prehire agreements only in the construction industry because of the need for contractors to be assured of manpower for their projects and the cost of that manpower. Thus, Congress in 8(f) legitimated the process whereby contractors could lawfully enter into such agreements prior to commencing any actual construction work. It is equally clear, however, that Congress did not intend to force all contractors to become parties to 8(f) agreements, only tc permit their execution. The NLRB, in a long string of cases, with court approval has consistently interpreted Section 8(f) as permitting contractors to repudiate such agreements at any time prior to the union obtaining majority status among the employees.[1] A prehire agreement is treated as a preliminary step which may or may not "mature" into a full-fledged collective bargaining relationship based on a union's obtaining majority status among the employees in the unit.

HR 281 proposes tc eradicate all of the carefully delineated controls which Congress placed on Section 8(f) agreements. Under HR 281 any 8(f) pre-hire agreement would be automatically treated as a full-fledged binding labor contract even where no employees have been hired or where less than a majority of those employees are union members. Such an agreement would remain in effect unless and until the employees able to vote out the union in an NLRB decertification election. In my opinion, HR 281 does not reflect in any fashion what Congress intended in enacting Section 8(f) and does violence to the rights of employees to determine whether or not they wish to be represented by a union.

A simple example is instructive. A contractor who enters into an 8(f) agreement prior to commencing any work on a particular project anticipates that the construction union will be able to furnish him with a skilled journeyman workforce. However, in times of full employment, unions frequently simply are unable to refer the workers that the contractor needs. In such cases, the contractor must assemble his own workforce from any source he can, usually non-union workers. It makes no sense at all to require that contractor to continue to honor the 8(f) agreement when the union has no representation at all among the contractor's employees. Clearly, the Section 7 rights of the employees actually hired are destroyed by imposing a stranger union on that bargaining unit.

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[1] See, e.g., R.J. Smith Construction Co., 191 NLRB 693 (1971); Ruttman Construction Co., 191 NLRB 701, (1971); Irvin McKelvy Co., 194 NLRB 52 (1971), *enf'd in part*, 475 F.2d 1265 (3d Cir. 1973); *Baton Rouge Building and Construction Trades Council* v. *E.C. Schafer Construction Co.*, 657 F.2d 806 (5th Cir. 1981); *NLRB* v. *Haberman Construction Co.*, 641 F.2d 351 (5th Cir. 1981) (en banc); Pacific Erectors, Inc., 256 NLRB 421 (1981), enf'd, 99 Lab.Cas. (CCH) ¶ 10,522 (9th Cir. 1983).

The right to repudiate an 8(f) agreement before majority status is obtained by the union makes every sense. It fits the reality of these situations. It does not represent an abuse by contractors, particularly when the rights of the affected employees are weighted in the balance. Where the union obtains majority status in a bargaining unit, the agreement becomes secure and fully enforceable for its term. Even prior to the union's achieving majority status, the 8(f) agreement is fully enforceable, absent contractor repudiation *McNeff* v. *Todd,* 461 U.S. 260, 75 L.Ed.2d 830 (1983)).

HR 281 attempts to do too much with too little. The very essence of an 8(f) agreement is that it is preliminary to subsequent events which may or may not convert it into a full-fledged Section 9(c) bargaining relationship. Legislation making 8(f) agreements automatically into 9(c) agreements will violate the most fundamental tenet of the NLRA—that a majority of employees must demonstrate their desire to be so represented. Further, this law will have only one practical result—fewer and fewer contractors will be willing to enter into any collective bargaining relationship with the construction trade unions.

Mr. Clay. Thank you. Mr. Nash.

Mr. Nash. I am joined this morning by my partner, Michael Taylor, an expert in construction labor matters. We have submitted a memorandum to back up our written testimony and I ask that that memorandum as well as our testimony be included in the record.

Mr. Clay. Without objection, it will be.

Mr. Nash. The purpose of H.R. 281 is to protect the rights of workers in the building trades to the benefits of collective bargaining, which benefits, apparently it is alleged, have been eroded by new interpretations of the law which have allowed contractors to organize double-breasted operations, and then transfer union work to the non-union arm of that double-breasted operation. Further, again as we understand it, those benefits of collective bargaining have been eroded because contractors are able to repudiate prehiring agreements entered into with unions in the construction industry.

We suggest, however, that H.R. 281 is not a necessary piece of legislation. We have at least three reasons outlined in our testimony for that suggestion.

First, construction unions now have more legally protected power than any other unions in our society. In fact, construction unions have such legally protected power that workers in the construction industry are the only employees under the National Labor Relations Act that have a right to union representation whether they want it or not. Further construction union representation not only has a chance to be effective, it has a greater chance than union representation in other sectors of our economy. A construction union can force contractors to agree that all employees on a job site will be unionized—a right shared only by unions in the garment industry. Construction unions may require union membership after 7 days of employment—rather than the 30 days of employment required in all other industries. Unlike all other industries, construction unions may enter into agreements with employers which impose union representation on employees before any are even hired. They may require employers to use union hiring halls to obtain workers. And they may gain agreements from employers setting training qualifications for employees in order to protect the job rights of workers trained in union-sponsored apprenticeship programs. Finally, construction union contracts, like other labor contracts, are enforceable by strike or picket action, or by arbitration and lawsuits. In sum, construction labor unions already have more legally protected power in the labor market than unions in other industries, and, at least to the extent that the law can effectively protect the benefits of collective bargaining, new legislation, particularly in the form of H.R. 281, is scarcely required.

Second, H.R. 281 is based upon a number of highly questionable premises. For example, the bill's sponsor supports the need for H.R. 281 by stating that new interpretations of the law allow construction companies simply to set up a nonunion company and transfer the work of the union company to it. The new law referred to, however, is at least 23 years old—or almost half the life history of the National Labor Relations Act—and that law does not allow construction employers to avoid union contracts by simply transferring work to a new, nonunion company.

Further, contrary to the sponsor's suggestions, (1) prehire agreements in the construction industry are totally enforceable once the union represents a majority of employees; (2) majority support is relatively easy for construction unions to establish; (3) such agreements are enforceable until terminated even if a majority of employees doesn't desire union representation; and, (4) Congress intended that such agreements be terminable when it enacted section 8(f).

Third, H.R. 281 goes far beyond its stated purpose of protecting the rights of construction workers to the benefits of collective bargaining. Rather, the bill forces labor agreements and union representation upon thousands of construction workers who have not chosen union representation, and it does so merely because those employees work for separate construction companies that happen to be owned by people who also own unionized construction companies. Further, the bill forecloses any chance that those employees may vote to reject the union during the term of the labor agreement that was forced upon them.

In sum, and for the reasons set forth above, we do not and cannot support H.R. 281.

I would like to respond to a couple of comments that were made earlier today.

It is not only an employer that has the right to repudiate a prehiring agreement, but a union may also do so prior to the time that it gains majority status.

Second, there are very few instances in history in which employers have, in fact, repudiated 8(f) prehire agreements because, as a practical matter, it makes sense for them to continue a project under the terms of that agreement or because the union quickly gains majority status, thus converting the agreement into a fully effective and enforceable collective bargaining agreement.

Finally, the meeting-of-the-minds concept has been discussed here today, as a basis for contending that it is unfair for an employer to enter into an agreement and then repudiate that agreement. The problem with that concept is that the union that enters into a prehire agreement does so representing nobody at that point. At such point in time as a majority of employees who are covered by that agreement indicate that they want the union to represent them, that agreement does become binding.

What Congress did in 1959 was to say that construction unions and employers may enter into an agreement where the union represents nobody, and that agreement won't violate the law as would such an agreement in every other industry in our society. But the union, the employer or employees may repudiate that agreement at any time prior to the time the union represents a majority of employees.

This concept is not unlike common law legal doctrine, which, for example, allows either party to void or repudiate an agreement when there has been a mutual mistake of fact, which allows someone under the age of 21 to repudiate an agreement any time prior to reaching his or her majority.

And this was a concept written into the law by a Congress that recognized a very limited exception to the rule that generally employers and unions can't enter into any kind of an agreement until a union represents a majority of employees. But to protect employees, Congress gave construction unions the right to enter into those agreements but made them unenforceable for their full term until such time as a majority of employees covered by the agreement have supported the union.

I thank you.

[Prepared statement of Peter Nash follows:]

Prepared Statement of Peter G. Nash and Michael A. Taylor

This Memorandum is intended to support the May 21, 1985 testimony on Peter G. Nash and Michael A. Taylor before the Subcommittee on Labor-Management Relations in opposition to H.R. 281. We discuss below (1) the extraordinary powers of construction labor unions to which H.R. 281 would add additional powers; (2) the existing legal restrictions upon an employer's ability to transfer union construction work to a new, non-union company (a "double-breasted" company); and (3) the negative impact of H.R. 281 on existing construction employee rights under the National Labor Relations Act.

STATUTORILY PROTECTED POWERS OF CONSTRUCTION UNIONS

For the past 25 years, construction unions have been the beneficiaries of statutory provisions in the National Labor Relations Act which have been granted to no other unions and which give them extraordinary powers to represent employees who are seldom given a chance to decide whether or not they desire union representation. These powers are primarily found in Sections 8(f) and 8(e) of the Act.

Section 8(f): Normally under the National Labor Relations Act an employer and union may not lawfully enter into an agreement covering employees unless a majority of the employees in an appropriate collective bargaining unit select that union to be their bargaining agent. Indeed, an agreement with a minority union violates Section 8(a)(2) of the Act. 29 U.S.C. § 158(a)(2). Under Section 8(f), however, a construction employer may enter into an agreement with a union before the employer has hired any employees—and that agreement may set the wages and working conditions of future employees and provide that the employer will hire needed workers from a union hiring hall. Absent Section 8(f), such an agreement would be an unlawful violation of employee free choice. The effect of Section 8(f), therefore, is simply to insulate the employer and the construction union from unfair labor practice claims.[1]

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[1] *N.L.R.B.* v. *Iron Workers, Local 103 (Higdon Contracting Co.)*, 434 U.S. 335 (1978).

An 8(f) agreement is enforceable against either party (the union or the construction employer) but may be terminated by either party until such time as the union represents a majority of the employees covered by the agreement.[2] In order for the 8(f) agreement to become prospectively binding upon the parties for its entire term, it must be transformed into an agreement controlled by Section 9(a) of the NLRA when the union achieves majority support from the workers in the relevant unit of employees.[3]

From a practical standpoint, it is not difficult for construction unions to obtain majority status without engaging in any extensive organizational efforts. Normally an 8(f) agreement applies to separate projects and is transformed into a 9(a) agreement when the union obtains majority support on a single jobsite.[4] Further, the construction union is aided in gaining that majority status by at least two presumptions. First, construction unions and employers may adopt union-shop clauses which require construction employees to join the union within 7 days of beginning work,[5] and the existence of such a union security clause in a prehire agreement provides a rebuttable presumption of the union's majority status.[6] Thus, if the construction union enforces the 7-day requirement, it will quickly achieve majority status and thereby convert the prehire agreement into a collective bargaining agreement enforceable for its entire term. Second, 8(f) allows construction employers and unions to agree to the use of union hiring halls in their prehire agreements, and the contractor's exclusive use of the union's hiring hall as a source of labor gives rise to a similar presumption of majority support for the referring union.[7]

Section 8(e): In enacting Section 8(e) in 1959, Congress gave construction unions an additional weapon to obtain majority status without the need to organize employees. It is unlawful under Section 8(e) for a union and an employer (other than employers in the construction and the garment industries) to negotiate "secondary" union signatory agreements which provide that the employer will contract or subcontract only to an employer with a union contract. Such a prohibition on subcontracting is unlawful because it is not necessary to protect employees from lower wage competition and the object of such an agreement is to affect the labor relations of secondary employers. In addition, a clause which restricts subcontracting of work other than that traditionally performed by the union signatory to the clause is unlawful because it seeks to aid other union members rather than to preserve the work of those employees covered by the labor agreement. A non-construction union that strikes to pressure an employer to agree to such an illegal 8(e) clause violates Section 8(b)(4)(ii)(A) of the Act, and is subject to the mandatory 10(1) injunction procedures of the Act.

The so-called "construction industry proviso" to Section 8(e), however, renders lawful these otherwise illegal, secondary union signatory agreements when entered into between a union and an employer in the construction industry.[8] And a construction union may strike or picket to obtain such an agreement.[9]

In summary, under existing law, a construction union may enter into an agreement with a construction contractor which covers employees who are not even yet hired by that contractor and have never indicated a desire for union representation. Further, as part of that agreement the construction union may require that the employees of all other contractors who work with the signatory contractor be union-represented, whether they want that representation or not. And if the union refers workers from its hiring hall or has a permissible 7-day union security agreement with the construction contractor, those "union only" requirements will prevail for the term of the labor agreement. Under these circumstances, construction unions hardly need additional legislation to protect the benefits of collective bargaining.[10]

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[2] Any rights or obligations that arise prior to termination, however, remain enforceable. *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983).

[3] See Higdon Contracting Co., supra; *N.L.R.B.* v. *Haberman Construction Co.*, 641 F. 2d 351 (5th Cir. 1981).

[4] In addition, when a union can establish that it has achieved majority status among employees who make up a contractor's "permanent and stable work force," the union becomes the Section 9(a) representative for all sites of the employer, present and prospective. A stable work force is found by the Board and courts when a contractor moves a substantial number of its unit employees from job-to-job rather than hiring on a jobsite-by-jobsite basis. Construction Erectors, Inc., 265 NLRB 786 (1982).

[5] This provision contrasts sharply with the 30-day grace period requirement for union-shop clauses allowed under Section 8(a)(3) for all other industries.

[6] R. J. Smith Construction Company, 191 NLRB 693, 695 n.5 (1971), rev'd and remanded, 480 F.2d 1186 (D.C. Cir. 1973).

[7] Ruttmann Construction Company, 191 NLRB 701 (1971).

[8] To be lawful, that agreement must restrict contracting or subcontracting only of work to be done at a construction site and must be entered into in the context of a collective bargaining relationship. *Woelke & Romero Framing, Inc.* v. *N.L.R.B.*, 456 U.S. 645 (1982); *Donald Schriver Inc.* v. *N.L.R.B.*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

[9] Northeastern Indiana Building & Constr. Trades Council (Centlivre Village Apartments), 148 NLRB 854 (1964), enf. denied on other grounds, 352 F.2d 696 (D.C. Cir. 1965).

LEGAL RESTRICTIONS ON "DOUBLE-BREASTING"

The courts and the NLRB have long recognized that it is common in the construction industry for one company or group of owners to have two separate organizations, one to handle contracts performed under union conditions and the other to perform under "open-shop" (non-union) conditions. Such a "double-breasted" operation is not inherently illegal. Nevertheless, construction unions have continued to resist the use of double-breasted operations in the construction industry because, understandably, they would prefer to have the industry completely unionized. One response by the unions has been to bring large numbers of unfair labor practice charges before the NLRB that seek to extend coverage of a labor agreement to an employer's non-union operations. Scores of Board and court decisions finding that such union charges have merit amply demonstrate that the present Bill's sponsor is wrong in suggesting that contractors have a virtual free hand to avoid labor agreements obligations.

Two legal doctrines in particular rebut the charge that construction employers may simply create a non-union company and transfer work to it in order to avoid the obligations of a union contract. Those are the "single employer" and "alter ego" doctrines.[11]

First, under the "single employer" doctrine, two commonly owned and managed companies that function with common labor relations policies and interchange their employees constitute one, single employer, and the labor agreement of one may cover the employees of the other.[12] If the two companies are separate, however, the union contract of one does not cover the other, any more than General Motors' agreement with the United Auto Workers would cover Ford workers just because a majority of the stock of the two companies was owned by the same shareholders.

Second, under the alter ego doctrine, when the owners of a unionized company form another corporation to which they transfer a substantial portion of their assets, customers, management and employees in an effort to avoid their contractual and legal obligations with a union, the NLRB and courts have no trouble "piercing the corporate veil" and concluding that the new company stands in the shoes of the pre-existing, unionized company—i.e., bound by the same contracts and legal obligations.[13]

Finally, an employer that deliberately diverts union work to its non-union operation without bargaining with the union may violate the Act,[14] and the courts and arbitrators have enforced the provisions of labor agreements on non-union, commonly held companies.[15]

In summary, present legal requirements restrict a construction company's ability to start a non-union company and simply transfer the work of its union employees to the non-union company. Accordingly, H.R. 281 is not necessary to protect construction employees or the benefits of their collective bargaining.

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[10] It is true, of course, that 8(f) agreements may be terminated by an employer or union before the union gains support from a majority of employees and that employees may vote to reject union representation before majority representation is established. However, Congress made the judgement in 1959 when it enacted 8(f) that some protection of employee rights to reject unionization was required, even for construction workers, and it provided that protection by requiring majority union support before 8(f) agreements would become enforceable for their entire term. *N.L.R.B. v. Iron Workers, Local 103 (Higdon Construction Co.), supra; Jim McNeff, Inc.*, v. *Todd, supra.*

[11] E.g., *N.L.R.B. v. Al Bryant, Inc.*, 711 F.2d 543 (3d Cir. 1983), cert. denied, —— U.S. ——, 79 L. Ed. 2d 165 (1984).

[12] *South Prairie Construction Co. v. Local 627*, 425 U.S. 800 (1976); *N.L.R.B. v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir.), cert. denied, 444 U.S. 940 (1079).

[13] Even less blatant transfers of functions to a new or different entity have been found to create an alter ego relationship. In such cases, the NLRB and courts have looked to the extent of common ownership, management, business purpose, operation, equipment, customers and supervision of the two businesses. Where some of those indicia are substantially identical between the two companies, an alter ego status will be found even though not all of those factors are common. Denzil S. Alkire, 259 NLRB 1323 (1982); Blake Construction Co., Inc., 245 NLRB 630, 634 (1979), *enf'd in relevant part*, 663 F.2d 272 (D.C. Cir. 1981); *J.M. Tanaka Construction, Inc.* v. *N.L.R.B.*, 675 F.2d 1029 (9th Cir. 1982).

[14] *A-1 Fire Protection, Inc.*, 273 NLRB No. 124 (1984).

[15] See, e.g., *Metropolitan Detroit Bricklayers District Council* v. *J.E. Hoetger & Co.*, 672 F.2d 580, 583–84 (6th Cir. 1982); *IBEW, Local 59* v. *Namco Electric*, 653 F.2d 143 (5th Cir. 1981.

THE REAL IMPACT OF H.R. 281

The terms of H.R. 281 seek to accomplish three basic objectives. First, the Bill provides that any two or more businesses in the construction industry performing similar work and having "any direct or indirect common ownership, management or control shall be deemed a single employer." By that simple provision the Bill eliminates the secondary boycott protections of the Act for separate but commonly owned construction companies. Accordingly, any construction union having a dispute with a unionized company may picket or otherwise pressure a separate business if the two are "indirectly" owned by the same persons. That provision eliminates the time-tested and stringent legal guidelines developed by the NLRB and the courts to determine if the degree of integration of the two businesses is sufficient to treat two employers as one. In its place, the Bill creates a per se rule that would foist the union on the employees of a non-union contractor and take away secondary boycott protection from the unoffending open shop if there was even the hint of any degree of common ownership, management or control regardless of the lack of true operational integration. In effect, H.R. 281 would eliminate double-breasted operations entirely in this country by requiring employers to invest exclusively either in union or non-union construction companies.

Second, the Bill requires that any collective bargaining agreement of a union company shall cover employees of any "single employer" company. This provision drastically changes present law, requires construction investors to seek out either 100% union or non-union company investments and requires employees throughout the construction industry to become unionized without any right either to reject union representation or to select the particular union they wish to represent them.

Third, H.R. 281 makes 8(f) agreements non-terminable and enforceable for their term whether or not the union party represents any employees covered by that agreement. Although the Bill provides that the 8(f) agreement may be repudiated after an election by a majority of employees rejecting the union, the Board will not hold such elections during the term of an enforceable agreement.[16] Accordingly, all employees covered by an 8(f) agreement will be bound to union representation at least for the term of that agreement.

Present law provides for a limited exception to the basic principle of the Act—that employees have the right to select or reject union representation. Under the present Section 8(f), construction unions may impose an agreement upon construction employees, but only if their employer agrees and only so long as the union, the employees and the employer desire continued union representation. H.R. 281 drastically changes that delicate balance and, in the process, eliminates employee free choice in the construction industry. Thus, the Bill imposes labor contracts on employers and employees who have never agreed to them and it binds those employees and employers to those agreements and union representation for the term of the agreement, even if employees want to reject union representation. This not only flies in the face of the free choice principles of the Act, but it is also unnecessary and unwise given the extensive special powers and rights already accorded construction unions under the law. Accordingly, we urge the Congress not to approve this legislation.

Mr. CLAY. You say that prehire agreements in the industry are totally enforceable ones where the union represents a majority, and went on to say that majority support is relatively easy for construction unions to establish. Tell me how easily that is established.

Mr. NASH. Most employers enter into a prehire agreement with the union which includes an exclusive union hiring hall provision, the employer obtains its employees from that union hiring hall and the NLRB presumes that a majority of those employees from the hiring hall support the union. The 8(f) agreement is then immediately converted into an agreement enforceable for its entire term. Or if the collective bargaining agreement contains a union security clause, the Labor Board will presume that at least after 7 days of the hiring of the initial work force, the union represents a majority of those employees, and unless the employer can prove to the contrary, the agreement is converted into an enforceable collective bargaining agreement for its entire term.

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[16] The Bill eliminates the present 8(f) proviso which provides that an 8(f) prehire contract does not act as a bar to an election petition filed pursuant to Sections 9(c) or 9(e). Thus, H.R. 281 will protect a construction union from inquiry into its majority status during the term of the pre-hire agreement.

Mr. CLAY. How does an employer overcome this first presumption that you mention?

Mr. NASH. By objective evidence. For example, if a majority of the employees approach the employer and say "we don't want this union to represent us." But other than that, it is difficult, if not impossible, for the employer to overcome that presumption.

Mr. CLAY. How do you answer the statements that have been made this morning—I assume you are saying it is a legally binding agreement that the two have entered into?

Mr. NASH. Once the union represents the majority of employees.

Mr. CLAY. The mere fact that they entered into that and are using hiring hall employees, you say we are to presume——

Mr. NASH. That raises the presumption that the union represents the majority and that agreement is then enforceable for its entire term—3 or 2 years, or however long.

Mr. CLAY. How do you answer the allegations that have been made that after entering into this agreement and the one party goes out and totally ignores the agreement that they have just entered into by not using the hiring hall, not using the union members?

Mr. NASH. An employer could enter into such agreement and repudiate it before the employer has hired anybody. In those circumstances the union would not represent a majority of employees because there aren't any employees. Under those circumstances the employer or the union could repudiate the agreement. Either side may repudiate a 8(f) agreement.

Mr. CLAY. In other words, the agreement that is legally binding is worthless?

Mr. NASH. It is not legally binding for its full term under the law until such time as the union represents a majority of employees. That is consistent with the basis concept of the National Labor Relations Agency. All other unions in our society would participate with the employer in a violation of the National Labor Relations Act by entering into an agreement before the union represents a majority of the employees. Congress said in 1959 that it would make a single limited exception for the construction industry, and allow construction industry employees and unions to enter into agreements. That Congress determined that such agreements wouldn't be enforceable until such time as the union represented a majority of the employees covered thereby, just like any other collective bargaining agreement in our society. But it wouldn't be a violation of the law to enter into it first.

Mr. CLAY. There are different interpretations of what the law said in 1959. I don't want to belabor that point.

In the memorandum that you asked to be put into the record, you have a footnote 16 which says:

The bill eliminates the present 8(f) proviso which provides that an 8(f) contract does not act as a bar to an election petition pursuant to sections 9(c) or 9(e). Thus, H.R. 281 will protect a construction union from inquiring into its majority status during the term of the pre-hire agreement.

Mr. **Nash**. Yes.

Mr. **Clay**. Where in this bill does that happen?

Mr. **Nash**. The bill says that the agreement is enforceable as a 9(a) agreement until rejected by a vote of the employees. Under NLRB law, an election will not be held for employees during the term of a 9(a) agreement. The contract is a bar to election, and, therefore, no election will be held, even if employees don't want the union to represent them during the term of the agreement.

The terms of your bill make it a 9(a) agreement, a bar to election. Therefore, for the period of that agreement, no election will be held by the NLRB and the union will represent those employees who will be covered by the agreement, even if they don't want to be.

Mr. **Clay**. This bill does not touch that proviso.

Mr. **Nash**. I beg your pardon?

Mr. **Clay**. This bill does not touch the 8(f) proviso. Show me where it touches it.

Mr. **Nash**. As I read it, it replaces that proviso.

Mr. **Clay**. As I interpret the bill, we can still have a decertification election.

Mr. **Nash**. If I am wrong, I stand corrected. I didn't read it that way.

Mr. **Clay**. Well, we disagree on that one, too.

Mrs. Roukema.

Mrs. **Roukema**. Your testimony is extraordinarily interesting and we will have to do a comparative analysis with the diametrically opposed testimony of the unions. Let me just ask one or two questions?

Mr. Fay, does your company operate with respect to union and nonunion employees?

Mr. **Fay**. Our company is in the general contracting civil construction field, and 100-percent union. We have no double-breasted entity, one single union construction company for civil and general work.

Mrs. **Roukema**. Will you explain to me why you maintain that policy?

Mr. **Fay**. Well, we maintain that policy because we have had it for the 40 years we have been in business. We came very close to abrogating that policy in the late seventies, because we were no longer competitive in the marketplace. As chairman of our local labor committee, I went to the union and said, look, we have a contract expiring in a very short time. Here is the reality of the marketplace, either make us competitive, give us the tools to work with or we will have to make other arrangements.

Mrs. **Roukema**. That was in your testimony here today?

Mr. **Fay**. That is correct. That is what we did and what they did. We are still working on that. We are still not totally competitive in a free marketplace, because we still have jurisdiction in our agreements.

That is the worst bar we have right now. We feel with six crafts and each craft is only allowed to do a specific item, whether it be a teamster who drives a truck, an operating engineer who runs equipment or a carpenter and so on.

That is the biggest place where we are having a problem today. We are working at it this very moment, what we call an integrated work force or a composite crew so that those people employed in the job can step across those craftlines and be fully employed when there is less than a day's work for any specific craft.

We were union by choice. This thing of double-breasting, I think, is blown way out of proportion. The majority of the work that is not union is just done open shop, not by double-breasted contractors. Think about the makeup of this industry and the makeup of the contractors. Most of us are small, family-owned companies.

To give you some idea, if you take Engineering News records top 400, OK, the top companies are up in the billions, but by the time you get to number 400, you are down to maybe $20 to $30 million worth of work. That is only 400 contractors.

Then the other hundred thousand or so, we are all down there below that. It is not that easy for us just to go out and waive a magic wand and have a double-breasted company. We have to pass the criteria of the alter ego and the other decisions of the court so it is not quite as easy as portrayed here.

By and large, this industry is still made up of small family-owned individual firms who only ask for ability to be competitive. If the union can't give us that ability, we must have the ability to go do it in whatever fashion we choose.

Mrs. Roukema. Thank you.

We have discussed what a prehire agreement is, and what you are saying is that there was nothing in the law that has really changed.

Is that correct, as you understood it?

Mr. Nash. I am not sure I understand.

Mrs. Roukema. I want to get at this question of what the law was.

Mr. Nash. Prior to 1959, as I understand it, if a union and the construction contractor entered into a prehire agreement they would have violated section 8(a)(2), which prohibits an employer from entering into an agreement with a union that does not represent a majority of employees hired by that employer. In 1959, in recognition of the fact that the construction industry involves short-term employment and in recognition of the problems that contractors have in bidding on jobs and knowing what their costs are, Congress passed section 8(f), which allowed construction contractors and unions to enter into these prehire agreements—and Congress said that such an agreement would not be a violation of the law as it is in every other industry.

Mrs. Roukema. That would be an enforceable agreement?

Mr. Nash. It is an enforceable agreement until such time as it is terminated either by the union or the employer. They remain so today, Mrs. Roukema. The only argument is whether or not an employer or a union, prior to the time that the union represents a majority of employees, may terminate or repudiate that agreement. The Labor Board and the U.S. Supreme Court have said, "yes", either party may terminate that agreement prior to the time the union represents a majority of the employees. All the obligations that have arisen up until that time are enforceable.

Mrs. ROUKEMA. Why would anyone enter into a prehire agreement only to repudiate it, either union or employer?

Mr. NASH. I don't know that anybody would do it with the idea that they were going to repudiate it.

Mrs. ROUKEMA. It sounds as though it is being done all the time.

Mr. NASH. I don't think there are more than a half-a-dozen cases since 1959 in which the Labor Board has dealt with a repudiation agreement. There may be occasions when a union would determine, after entering into an agreement, that it can do better by repudiating, striking and picketing the employer—but rarely does that happen.

Mrs. ROUKEMA. Let me ask you this.

We have problems determining whether or not unions can gain majority status. Is that a difficult problem to resolve or a paper tiger?

Mr. NASH. My experience indicates that it is the limited exception in which the union does not very quickly establish majority status and thus make the agreement fully enforceable.

Mr. CLAY. Are we talking about a specific period of time or project by project?

Mr. NASH. Employers normally enter into a prehire agreement for a particular project, and within 7 days of the hiring of the people for that project the agreement becomes unbreachable and may run for a period——

Mr. CLAY. Well, tell me how a union could easily establish a majority within a 7-day period.

Mr. NASH. If an employer hires 15 people and there is a union security clause in the contract which says everybody must be a union member after 7 days, the Board will presume after 7 days, that everybody on that job is a union member or supports the union. That agreement then becomes a fully effective collective bargaining agreement fully enforceable for the full term of that agreement.

Mr. CLAY. How is it enforceable if the one side or the other can terminate at will?

Mr. NASH. You can't. Only up until the time that the union represents a majority may either side terminate, which is a rare occurrence in the construction industry.

Mr. CLAY. I am more confused than ever.

Mr. NASH. Put it this way. My 19-year-old daughter enters into a contract to buy magazines. She may terminate that agreement because she is a minor (under 21) at any time until as she becomes 21. Thereafter, she may no longer terminate that agreement. It is enforceable and she has to buy those magazines for the full term of the agreement.

The same situation applies in the construction industry. Construction employers and unions enter into an agreement which either may terminate up until the time the union represents a majority of employees. Once the union represents a majority everybody has become 21 and the agreement is enforceable for its entire term.

Mr. CLAY. Well, then, how do they terminate the agreement?

Mr. NASH. After they have become 21?

Mr. CLAY. Yes.

Mr. NASH. They may not terminate it.

Mr. CLAY. They are terminating them. That is why we are having the problem.

Mr. FAY. Perhaps you are putting too much emphasis on prehire agreements. The majority of unionized construction work was done on a legitimate collective bargaining agreement that had a term in it.

The prehire agreements came in more for project agreements in single jobs. In our organization, we represent 102 contractors to do some 3, 4 hundred million dollars' worth of work a year. We don't have any prehire agreements.

We have a collective bargaining agreement. There is too much emphasis being put on strictly a prehire that we can walk away from. We can't walk away from our collective-bargaining agreement but if that agreement comes to term and cannot be renegotiated to keep us competitive, we must walk away from it and what you are doing with your bill is taking an association like mine which is 102 union contractors, and giving them a drastic choice and the choice is right now, they only can compete in 30 percent of the marketplace.

And now you are going to hang this sword over their head. The only choice I have to have at the end of the contract, since I can't operate double-breasted, my union agreement does not make me competitive, is to abrogate or terminate my union agreements when the period is up and go straight open shop and that is what you will force us to do.

Mr. CLAY. Well, you can do that now. You don't have to sign the union agreement. I don't think this legislation imposes any new law on anybody. We are just saying you enforce the present law

Mr. Bartlett.

Mr. BARTLETT. Let me bring you back to the results.

In your opinion, what would the primary results be of the passage of this legislation [H.R. 281] if it were passed and signed into law? Would there be a result on employment opportunites for construction workers, both union and nonunion, or a result in fewer unionized workers?

Mr. FAY. I think the result, particularly in our area, would be less union workers. At the present time, we are able and we have this joint labor-management committee that tries to work to the mutual benefit of both the employer and the employee, but we still have the opportunity.

We still have the right to go double-breasted or to go strait open shop. We chose to be union, but now since we made that choice and at the present time we could be double-breasted, if you passed the law, then we couldn't have the opportunity to be double-breasted.

We either have to be 100 percent union or a 100 percent open shop, and with the open shop doing 70 percent of the marketplace, you would see which direction we would have to go.

We are willing to stay—believe it or not—a large majority of union contractors would like to stay union. There are advantages, but we can only stay union if we can compete in the free marketplace, and in order to do that, there must be a labor-management committee that removes old restrictive work practices from contracts and things which raise our cost above an open shop contract and that is the only way we will survive.

Mr. **Bartlett**. Describe for us, if you would, the reasons that cause a company to become double-breasted as opposed to being strictly open shop? Is it competitive requirements?

Mr. **Fay**. On the big traveling companies, many in certain areas can work union. One of the companies that was alluded to went in and opened up an open shop, historically our area works union because that agreement allows them to be competitive.

In other areas there is no way they can compete with a union contract and they have to bid the job and compete and work with their open shop companies.

Mr. **Bartlett**. You are suggesting those companies that are now double-breasted in order to obtain work would be increasingly inclined to go strictly open shop.

Mr. **Fay**. That would be the only economic decision that they could make.

The other thing that somebody mentioned in our areas is the fact that there are people who own two union companies. In Pennsylvania we have both AFL–CIO representing construction workers and we have the United Steel Workers, and that is not as unprevalent as you might think it can be. I would like to justify what would happen in that circumstance, which contract would rule.

Mr. **Bartlett**. Let me ask you then the question on the related subject which is not in the bill and that is, in the secret ballot concept. Do you think that employees should be given the right to a secret ballot to accept or reject a contract, to be represented by a union or not? Under a majority of the prehire agreements, the employees really don't have any sort of a vote. They just sign their employment contract and if they don't sign, then they are not hired. Therefore, they are represented by a union whether or not they wanted to at all. Would you think it is time for a secret ballot requirement?

Mr. **Fay**. I think it is necessary. I think the secret ballot is the only way they should be conducted.

Mr. **Bartlett**. Thank you.

Mr. **Clay**. Thank you for your testimony. I have no further questions.

The committee is adjourned.

The record will remain open for 2 weeks so that additional comments may be inserted into it.

The committee stands adjourned.

[Whereupon, at 12:20 p.m. the subcommittee adjourned, subject to the call of the Chair.]

[Material submitted for inclusion in the record follows:]

Building and Construction Trades Department,
Washington, DC, June 3, 1985.

Hon. William Clay,
Chairman, Committee on Education and Labor,
Washington, DC.

Dear Chairman Clay: Please accept this letter as a supplement to my testimony of May 21, 1985, before the Subcommittee, urging passage of H.R. 281.

Specifically, I wish through this supplemental statement to comment on certain aspects of the statements submitted by the Associated General Contractors of America and by Mr. Peter G. Nash. I believe that the purposes and scope of H.R. 281 are clear enough, namely, to reinvest Section 8(f) prehire agreements with the viability which Congress intended when it enacted that Section in 1959, and to end the dishonest device of double-breasting as a means of avoiding construction industry collective bargaining agreements. Nevertheless, the AGC and Nash statements attempt to confuse and distort the issues actually raised by the bill. Accordingly, I want to point out some of the fallacies contained in the statements which they have filed with the Subcommittee.

1. The AGC statement claims at several places (pages 1, 2 and 3) that H.R. 281 would impose collective bargaining agreements on "independent" and "truly separate" business entities in the construction industry. That simply is not the case. Sections 2(a) and (b) of the bill, which are designed to eliminate the practice of double-breasting, are aimed at related and not independent business entities. Significantly, the AGC statement complains (at page 3) that all that would be necessary under the bill, to bring two construction firms under the same collective bargaining agreement, is "direct or indirect ownership, management or control." [1] Yet, as AGC itself acknowledges (at page 2), among the tests presently applied for determining single employer status are common ownership, financial control or management. Thus these elements of single employer status are not changed at all.

What has often happened under the present rules is that the Board has seized on the element of common control of labor relations as a decisive factor in refusing to find that two related companies are a "single employer." In doing so, the Board has ignored the D.C. Circuit's holding in the *Kiewit* case, *Operating Engineers Local 627, NLRB*, 518 F 2d 1040 (1975), affirmed on this point sub nom. *South Prairie Construction Co.* v. *Operating Engineers Local 627*, 425 U.S. 800 (1976), that common control of labor relations is not necessarily the critical factor, particularly where the parent company establishes the framework of the subsidiary's labor relations policy by determining in advance that the latter will operate on a non-union basis. The decisive factor under the Kiewit holding is "whether, as a matter of substance, there is the 'arm's length relationship found among unintegrated companies.' " 518 F.2d at 1046. In short, all of AGC's rhetoric about "independent" and "truly separate" companies is misplaced.

For the same reason, the references in the AGC statement (at page 3) to "miniscule investments," or a position on the board of directors of a bank which provides construction loans, etc., are fanciful and not factual. If any clarification on this basic point is necessary, that can certainly be made plain in the committee report.

The next strawman raised by the AGC statement is that the language in Section 2(a) of the bill, referring to two or more companies "performing or otherwise conducting or supervising the same or similar work," would have the effect of including within its scope the general contractor on a project, along with its subcontractors; or imposing a carpenters' collective bargaining agreement on other trades (page 3). That argument is likewise unfounded. What the AGC conveniently overlooks is the central purpose of these sections of the bill: to strike at the problem of double-breasting. That problem does not run from a contractor to its subcontractors, or from a carpenters' contractor to a roofers' contractor. As this Subcommittee well knows, what in fact happens is that the carpenters' contractor will set up a second, related carpentry shop in order to perform the same kind of work, i.e., carpentry work, but on a non-union basis. That is the specific practice at which Sections 2(a) and (b) are aimed, and they are no broader than that. Once again, if the Subcommittee deems that such an assurance is necessary, that can easily be set forth in the report.

The AGC next focuses on Section 2(c) of the bill, which deals with Section 8(f) prehire agreements. The AGC is quite correct in stating that the *Higdon* decision would be reversed by this bill. That is, as I understand it, one of the principal purposes of the bill. Indeed, it is because of the NLRB's decisions in the *R. J. Smith* and *Higdon* cases, cited at pages 13-14 of my statement to this Subcommittee, that the subversion of Congressional intent in 1959 has occurred. I want to reiterate that the erroneous interpretation of Section 8(f) in the *Higdon* case was that of the Board, and that of the Supreme Court merely accepted and deferred to the Board's interpretation. Moreover, that deference was far short of a ringing endorsement of the Board's view, as the Court labeled the Board's interpretation only "tenable," "acceptable" (434 U.S. 341) and "defensible" (434 U.S. 350).

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[1] The AGC quote omits the word "common," which appears after "indirect" in Section 2(a) of the bill.

The AGC statement is most fundamentally flawed, however, when it states (at page 4) that Section 2(c) would impose a union and an agreement on employees against their will. That is simply not true. It should be recalled that the initial authority to "impose"—or, in the language of the statute, "make"—a prehire agreement in the construction industry is found in present Section 8(f), which is now 26 years old. Section 2(c) of H.R. 281 would not, therefore, "impose" an agreement on employees. It provides only that once a prehire agreement has been entered into, and the employer has accepted the benefits of that agreement, it cannot then repudiate the agreement before the end of its term.

Nearly half of the AGC statement consists of an endorsement of labor-management cooperation as a response to market factors. I wholeheartedly agree. But that approach can succeed only within the framework of collective bargaining. By definition, it cannot succeed when employers are allowed to flee from their collective bargaining obligations by contract repudiation or avoidance.

2. The memorandum offered in support of the testimony of Peter G. Nash and Michael A. Taylor argues that building and construction trades unions already possess "extraordinary powers" and that no additional powers are needed. As I stated in my testimony, if building trades unions in fact possess such power, I am not aware of it and would certainly appreciate being advised where it resides.

The major error in the Nash/Taylor memorandum is the statement (page 3) that a Section 8(f) agreement "normally applies to single projects and job sites." From that erroneous premise, a variety of conclusions are drawn to demonstrate (incorrectly) that it is easy for construction unions to obtain majority status. From my experience in the industry, I can state that well in excess of 95% of all 8(f) prehire agreements are in fact area-wide agreements, covering any project on which the signatory contractor may perform work within that area during the term of the agreement (which is most commonly for two or three years). It occurred to me following the hearing that some of the confusion on the part of Mrs. Roukema and Messrs. Bartlett and Armey may have resulted from their mistaken belief (fostered in part by Mr. Nash's testimony) that most 8(f) agreements apply only to a single, specific job. It may be useful for them to realize that the practice is precisely the opposite, and that the vast majority of 8(f) agreements cover a geographic area that is coextensive with the jurisdiction of the building trades union which is the other party to the agreement. And the geographic areas covered by those agreements can range from a metropolitan area to several countries to several states.

In spite of the broad scope of these prehire agreements, the courts have held, following Higdon, that employers can repudiate them after each project and that the union would have to establish majority support on a project-by-project basis. (See the statement of President Turner to this Subcommittee, at pages 6–8.) When these facts are understood, it is apparent that, contrary to the assertions of Mr. Nash, it is difficult, if not impossible, for unions to demonstrate majority status under these rules. Therefore, since the conclusions drawn by Messrs. Nash and Taylor at pages 3–4 of their memorandum all rest on the single-site agreement premise, and since that premise is wrong, the conclusions fall with the mistaken premise.

Next, the Nash/Taylor memorandum throws in its own strawman in referring to the construction industry proviso to Section 8(e), which they refer to as "an additional weapon to obtain majority status. . . ." Their subsequent discussion does not explain how the right to enter into subcontracting agreements to protect existing job-site work serves to organize additional employees, and I can state from my experience at all levels of the construction industry that the subcontracting clauses authorized by the 8(e) proviso simply do not operate to organize additional employees of the same trade or craft with the subcontracting agreement.

In a summary of the provisions of Section 8(f) and the 8(e) proviso (on page 5), the Nash/Taylor memorandum concludes that building and construction trades unions have no need for additional legislation in this area. I would simply refer the Subcommittee to the discussion of the legislative history of Section 8(f), at pages 11–13 of my statement, for the purpose of demonstrating Congressional recognition in 1959 that, because of the unique conditions which exist in the construction industry, and for the mutual benefit of employers, employees and unions alike, special accommodations had to be made to govern labor relations in that industry. We are not here to seek additional benefits or powers. We urge passage of H.R. 281 because it would restore the very benefits and conditions which Congress expressly granted in 1959 but which the Board, through a series of erroneous interpretations, has for all practical purposes taken away in the interim.

The Nash/Taylor memorandum also contains the incredible assertion that, in enacting 8(f), Congress made the judgment that the right of employee free choice had to be protected and—in order to do so—"it [the Congress] provided that protection by requiring majority union support before 8(f) agreements would become enforceable for their entire term." (Page 5, n. 10.) The Subcommittee members, however, will find no such requirement contained either in the language of Section 8(f) itself or in its legislative history. Rather, that requirement was an additional one, subsequently engrafted on Section 8(f) by the Board. In recognizing that employee free choice should be preserved, Congress in fact provided something entirely different, and that is the second proviso to Section 8(f), which states, "That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." In other words, the Board's usual "contract bar" rules would not apply to 8(f) agreements. That is the only protection which Congress afforded in this regard. I am obliged to note in this regard that, as the Chairman himself pointed out in his questioning of Mr. Nash, the Nash/Taylor memorandum contains another serious misstatement. At footnote 16, on page 10, it is claimed that H.R. 281 eliminates the present 8(f) proviso to which I have just referred. A careful reading of the bill will make it abundantly clear that that proviso is retained and, accordingly, that this bill will not prevent the holding of a Board election during the term of an 8(f) agreement.

In view of the lengthy discussion of the double-breasting problem contained in my statement and that of President Turner, I see no need for any extensive discussion of that portion of the Nash/Taylor memorandum. The long and short of it is that there are cases going both ways under both the "single employer" and "alter-ego" doctrines. In virtually all instances under the former, however, the end of the road is the same as in the *Kiewit* case, since the Board takes away under the appropriate unit issue what it may give on the question of single-employer status. In any event, the bottom line is that more and more construction companies, large and small, are going double-breasted and thus evading the obligations of the collective bargaining agreements which they entered into, and those with sophisticated lawyers can easily avoid the pitfalls which have led to some of the NLRB decisions which have been unfavorable to employers in the past.

Finally, in discussing what they claim is the "real impact" of H.R. 281, Messrs. Nash and Taylor make the preposterous claim that this bill would eliminate the secondary boycott protections of separate but commonly owned construction companies. As I have stated above in my comments on the AGC statement, it is clear that this bill is aimed at related, and not truly separate, businesses. Once again, I submit that this matter could be put to rest by clarifying language in the committee report.

It is also stated that H.R. 281 would eliminate double-breasted operations, with the result that employers would have to operate on an exclusively union or an exclusively non-union basis. As both President Turner and I stated in our May 21 testimony, we are quite prepared to accept that result if it is in fact the effect of this bill.

I hope that these additional comments may be useful to the members of the Subcommittee.

With kind personal regards, I am

Sincerely,

Robert A. Georgine,
President.

Statement of the American Subcontractors Association on the Construction Industry Contract Security Act of 1985

The American Subcontractors Association (ASA) is a national trade association with more than 5,500 firms representing all major construction trades in fifty-five chapters. It is the only national organization that speaks exclusively for the interests of both union and nonunion construction subcontractors. ASA is dedicated to improving general business conditions for subcontractors through unified and cooperative actions.

Over 80% of the total construction in the U.S. is performed by subcontractors. These subcontractors directly hire the specialized labor forces and directly purchase materials and equipment to perform this construction. Thus, ASA and its members have a direct interest in any legislative proposal that would impact labor management relations in the construction industry.

ASA strongly opposes H.R. 281, the Construction Industry Contract Security Act of 1985.

The ASA position was developed after careful consideration by the members of the ASA national legislative committee and the ASA Board of Directors. The decision of both the committee and the Board was unanimous.

If enacted, this legislation would set off another round of inflation of wage increases in construction on top of the already unstable levels of union construction wages. Contrary to our national labor laws, it would deny employees the right to vote for the union of their choice or not to belong to a union at all. It would empower the construction labor unions to engage in top down organizing and secondary boycotts. It would allow union monopolies to engage in price fixing with companies with whom they have no labor relations connection.

It is contrary to the just and sound national labor relations policies, boycott and antitrust laws, so arduously and carefully developed over a thirty-year period by Congress, courts and the National Labor Relations Board.

THIS BILL WILL CAUSE A NEW RECORD OF INFLATION IN UNION CONSTRUCTION WAGES AND WILL CAUSE FUTURE UNEMPLOYMENT

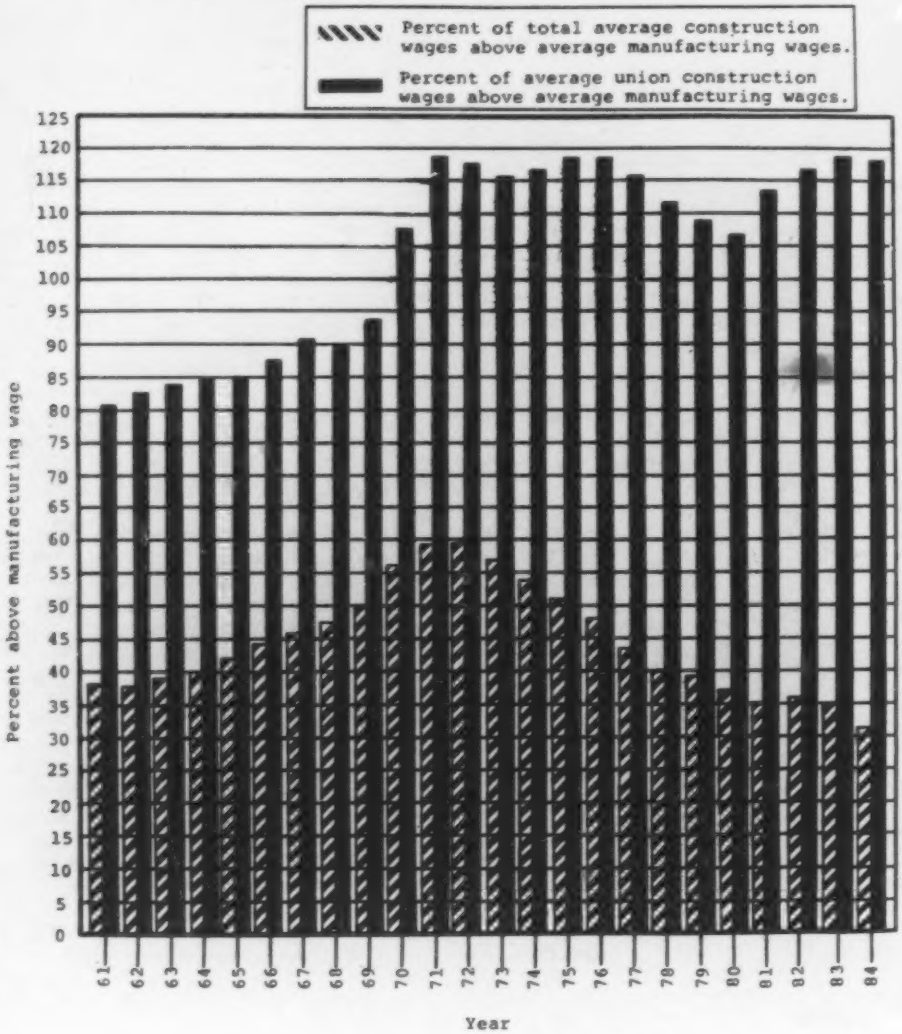
Construction unions are different from industrial unions in that they function more like an employer. Construction unions do the hiring and training, they provide continuity of employment, and they administer the fringe benefits. They set the wage rates and the personnel rules by bargaining with a counterpart employer association. They provide the supervision and even own the work with their concept of "jurisdiction." Jurisdiction is, in fact, simply another word for monopoly power within a craft and within a territory.

Until the 1970's, the construction unions had been able to maintain a monopolistic pricing structure for their labor because they had basically created a series of monopolies. In the 1950's and 1960's the construction unions were able to consolidate monopoly status within their crafts within various local territories. The construction unions have essentially been labor subcontractors to union contractors on a unit price cost plus basis. Beginning in 1968, the unions started abusing their monopoly power with unstable wage increases. The result was that by 1971, the average union construction wages were 119 percent above average manufacturing wages. In 1971, the federal government put the construction unions under a cartel manager when the government established the Construction Industry Stabilization Committee to provide for the prior approval of all construction wage increases. The Construction Industry Stabilization Committee stopped the increase in union construction wages as compared to manufacturing wages, but the construction unions have continued to maintain unstable wage rates.

In 1984, average union construction wages were 118 percent above average manufacturing wages. The total average construction wage rates (union and nonunion) declined to the point that they were 31 percent above average manufacturing wages in 1984. The average manufacturing wage in 1984 was $9.17 per hour, while the average union construction wage in 1984 was $19.94 per hour. Total construction wages (union and nonunion) averaged $12.03 per hour. This 118 percent ratio (more than double) of union construction wages above manufacturing wages is so unstable that the union construction market is, in fact, collapsing. The union construction industry is faced, not with a market erosion, but with a monopoly collapse.

It is also clear that the construction unions continue to hold a monopolistic pricing structure for their wages at a time when they are having to compete with nonunion wages. Attached is a graph which has been prepared showing the disparity in average wages between manufacturing and construction wage rates. The clear trend is that total construction wages have been going down in relation to manufacturing wages while union construction wages have been up in relation to manufacturing wages.

RATIO OF AVERAGE UNION CONSTRUCTION WAGES AND AVERAGE
TOTAL CONSTRUCTION WAGES VERSUS AVERAGE MANUFACTURING WAGES



Prepared by McNEILL STOKES
Statistical Source: U.S. Department of Labor
Bureau of Labor Statistics
Construction Labor Research Council

Legislation which would outlaw double-breasting in the construction industry would perpetuate the union monopoly, rather than letting the driving forces in the industry direct the market response.

When all is said and done in the current round of raging debate, the decision must ultimately rest on the basic and overriding economic question of whether it will be good or bad for the overall economy, not whether it is good for the construction unions. This legislation will have a negative impact and will cause further unemployment in the construction industry in that it will accelerate industrial unemployment in metropolitan areas, which are heavily unionized.

The proponents of this legislation, the national building trades, candidly admit that it would polarize a construction enterprise either totally union or totally non-union. The construction industry will have to polarize non-union in most areas where there is already substantial open-shop construction. This will occur throughout the forty states in which union construction has collapsed.

When industrial owners decide to build new plant capacity, they must make a decision on where to build the plant and also a decision on selecting a general contractor. The general contractors, whether union or non-union, make up their pricing by taking bids from subcontractors, who in turn may be union or non-union. The non-union competition that is always present in the marketplace is one of the major factors that keeps union wages in check. Therefore, at present there is an economic balance and competition between non-union and union general contractors and subcontractors.

However, if the industry is polarized, industrial owners will make an economic decision not to build plants in these areas where construction has gone totally union because the construction costs would be so much higher. Instead, owners will build new plant capacity in areas such as the south where construction projects are polarized non-union.

The result would be the unemployment of more and more construction workers in the north and midwest because they will have only limited industrial construction entering their area and those construction workers in the areas of the country which are polarized non-union will benefit by more employment. But the effect on the industrial workers would be catastrophic. Industrial construction in the areas which are polarized non-union would provide a surplus of jobs for its residents while the areas in the north which are polarized union would either be economically stagnant or recede. These are not hypothetical horribles; ASA is confident greater industrial and construction unemployment in the northern and midwestern metropolitan areas would assuredly follow enactment of this legislation.

This legislation will have an adverse impact on our national economic health by subjecting the country's largest industry to economic instability, and undoubtedly another round of inflation, just as the industry is beginning to emerge from a bout with recession and is still suffering from a high rate of unemployment.

It defies all reason why the construction unions should want more special treatment when, in fact, they have abused their monopolies to the point that they have pushed the public into having to pay their extremely high, unstable wages. The average W-2 of the union construction work on 2,000 hours is between $35,000 and $40,000. Many are higher than that. The group that created a monopoly, abused that monopoly and now want to perpetuate the monopoly by this legislation. That should not be the legislative policy of the United States Government.

THIS BILL DISENFRANCHISES THE EMPLOYEES' RIGHT TO VOTE

The foremost problem with legislation which proposes to outlaw dual shop operations is that it is in violation of the provisions of the NLRA which grant the right of self-determination to employees. Employees have the right to choose to be represented by a union or not. Merely because the employees of one company have chosen to be represented by a union does not mean that employees of a second company connected by some common ownership to the first should be forced to have that union as their representative.

The term dual shop (or double breasting) is misleading because they are not dual shops. They are two independent employers with independent management, independent labor relations and different employees. This bill would simply deny the independent employees of an open shop company the right to vote for a union of their choice or, the right to continue to choose no union at all. The legislation singles out the construction unions for favoritism. Our national labor policy is built upon insuring the right of employees to self-determination in appropriate bargaining units as to their choice of unions or not to join a union. It is an abhorrent thought that a bill would be passed that would dictate that a labor agreement reached with a totally different employer in a different bargaining unit would be forced on the employees of the nonunion company without their consent or right to self-determination. Not only is it contrary to the national labor policy, it is just basically UnAmerican.

The successful legal operation of a dual shop requires a finding by the NLRB that the nonunion and the union companies are separate employers. If the companies do not maintain independent operations in the first place, they would not be considered separate employers and the nonunion company would have to deal with the union which represents the employees of the union company. To decide whether there is a single or a dual-employer relationship, the NLRB and the courts consider several factors which will indicate whether the employers are either independent or allied. The courts and the NLRB balance all the indicators to see which group outweighs the other.

The most important guidelines for the determination of separate-employer status were summarized by the U.S. Supreme Court in *Radio and Television Broadcast Local 1264* v. *Broadcast Service of Mobile, Inc.* The criteria are (1) common management and supervision of operation, (2) common control of personnel policies and labor relations, (3) interrelation of operations, and (4) common ownership or financial control. No one of these factors is decisive, although the presence or absence of common control of labor relations, common supervision and management of operations, and interchange of employees between companies are particularly important. Common ownership should not in itself be an obstacle to separate-employer status. The distinction of separate employer status and separate bargaining units are discussed more fully in my book, Labor Law In Contractors' Language, in chapter 11, a copy of which is furnished the Committee for its reference. Having different employers and separate bargaining units under the same ownership is not merely a technical distinction. On the contrary, there are very substantive distinctions.

The proposed legislation would effectively do away with the separate employers inquiry conducted by the NLRB and require that the two companies be treated as a single employer regardless of whether they are in fact operated independently. It forces employees who have not selected a union as their representative to be represented by the union. The construction unions are simply too lazy to go out and organize from the "bottom up" like other unions to convince the employees to vote to designate them as their collective bargaining agent. By this Bill, the construction unions want to go to an existing union employer and force them to sign an agreement covering employees who they do not represent. They are attempting heretofore illegal "top down" organizing because they have not exerted the effort to organize from the bottom up and comply with our labor laws like other unions.

To legislatively declare that if one employer is union, then all employers with any common ownership must be union does not make sense under our labor laws. Our labor laws provide that even under one employer, different bargaining units may be union or nonunion. For example, the same employer may own different plants, one union and one nonunion. The union construction building trades want special treatment and they want to say that if there is any common ownership, all employers and their employees must have the union.

In addition, the proposed legislation usurps the power of the NLRB to designate an appropriate bargaining unit. Before the employer is required to include the employees of the new company within the employer's collective bargaining obligations to the union, it still must be determined that the two companies are an appropriate bargaining unit under Section 9 of the NLRA.

The case of *Peter Kiewit Son's Co. & South Prairie Constr. Co.*, 231 N.L.R.B. No. 13 (1977), aff'd F.2d (D.C. Cir., Case No. 77-2031, 1979), in the Supreme Court merely reaffirmed the traditional U.S. labor policy that there can be two bargaining units within the same employers and that the employees of each appropriate bargaining unit have the right to vote for a union of their choice or not to have a union and that the employees of a separate bargaining unit will not have the union forced upon them. This is well established labor law and based upon sound judgment.

THE LEGISLATION IS CONTRARY TO THE SECONDARY BOYCOTT PROHIBITIONS

In the proposed legislation the construction unions are attempting a classic example of a secondary boycott, a practice outlawed by Section 8(b)(4) of the National Labor Relations Act. This is because the union is using its leverage with the organized to force the nonunion into an agreement against the will of the employer and its employees.

If an open employer has achieved separate employer status under federal law, the nonunion company need not deal with the union which represents the employees of the commonly owned union company.

The purpose of this legislation, of course, is to involve other nonunion employers in labor contracts to which they are not a party. Through this legislation, a union is able to exert substantial leverage on a nonunion contractor whom it cannot otherwise organize on the merits or whose employees have not voted that they want the construction union to represent them. The prohibition against secondary boycotts is designed and intended to prohibit this. The comments made by Senator Robert Taft in 1947 during consideration of the Labor Management Relations Act are as true today as they were then:

"There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are prefectly satisfied with their conditions . . . On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes. If we choose to call them that." 2 NLRB, Legislative History of the Labor Management Relations Act of 1947, at 1107.

The effect of this legislation is to permit construction unions to use "top down" organizing tactics to force a nonunion construction company to become union even though the employees may prefer not to join a union. If the nonunion employees want to be represented by the union, they could petition and vote for the union in an NLRB election.

Our national labor laws provide for the organization of nonunion workers in many ways, including secret ballot elections conducted by the National Labor Relations Board. This is the correct course for unions to follow in organizing nonunion construction employers. This legislation gives the unions organizational weapons to use neutral, independent union employers and their employees as a force to organize nonunion employers and the nonunion employees who do not want the union to represent them.

As one of the top international organizers for an international construction union candidly said, "There are two ways to organize—to help someone or to hurt someone, and it is a lot easier to organize by hurting someone". Secondary boycotts hurt all neutral employers and their employees and shatter their peaceful labor relations.

However, what the unions and other proponents of this legislation do not seem to realize is that nonunion employers and employees will not be the only parties that will be hurt by this legislation. On the contrary, it is far more likely that union contractors and their union employees will suffer economically from the passage of this legislation. It will polarize the ownership of double-breasted construction companies to opt to go totally nonunion and, therefore, accelerate the already precipitous collapse.

THIS LEGISLATION IS CONTRARY TO OUR ANTITRUST LAWS AND INVITES PRICE-FIXING BETWEEN INDEPENDENT EMPLOYERS

Under this legislation, the construction unions are seeking to impose a uniform wage structure among both union and nonunion employers in spite of the fact that they have no bargaining relationship with the independent nonunion company. It may be desirable from a union standpoint to attempt to force that unaffiliated construction employer to pay wages equal to the union employer so that the nonunion employer does not get a competitive advantage but that is not the American way. With this legislation, labor costs would be fixed at the union rate by forcing the nonunion company to automatically agree to the contract which the union has with the union company. Fixing costs is tantamount to price-fixing when there is no employee labor relations involvement. The proposed legislation would force nonunion firms which have common ownership with a union company to pay higher union prices for labor, whereas, those nonunion firms that do not have an affiliation with a union firm would continue to be able to pay competitive market wages. This would essentially be a horizontal agreement between the union, union employers and nonunion employers to fix the union wage costs into their nonunion employer's wages when they have no bargaining relationship whatsoever with the union. Even though, admittedly, you cannot have valid dual shops unless they are a separate employer and a separate bargaining unit.

MANDATORY PREHIRE AGREEMENTS VIOLATE THE LONG STANDING LABOR POLICY

The 1959 Congress wrestled with the problems of whether prehire agreements should be permitted in any industry that would allow a union to enter into a contract before substantial numbers of employees were hired and thereby disenfranchised those employees from selecting a union of their choice or no union at all. That type of agreement is legal only in construction because an exception was carved out by then Senator John Kennedy that would allow a prehire agreement in the construction industry provided that it was not enforceable unless ratified by a majority of the subsequently hired employees.

Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admited into the narrow exception being established to the majority principle. Representative Barden, an important House Floor leader on the bill and a conferee, also noted that "[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers."

Senator Kennedy's explanation of the voluntary nature of the prehire provision is as follows:

Mr. Kennedy: I shall answer the Senator from Florida as follows—and it is my intention, by so answering, to establish the legislative history on this question: It was not the intention of the committee to require by section 604(a) the making of prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements." 105 Cong. Rec. 18128 (1959), 2 Leg. Hist. 1715.

The Supreme Court carried through with that compromise in *N.L.R.B.* v. *Local Union 103 Intern. Ass'n, Etc.*

The Supreme Court in *N.L.R.B.* v. *Local U. No. 103, Intern. Ass'n, Etc.* found that Congressional concern about coerced designations of bargaining agents did not "evaporate as the focus turned to the construction industry. Section 8(f) was, of course, motivated by an awareness of the unique situation in that industry.

Now the construction unions are trying to do something that is totally contrary to our laws; to require a prehire agreement that is binding on the employers and the employees. This is not in accordance with our labor law and it is totally foreign to our way of life. The loophole that they are proposing as a decertification petition should not be a substitute for an affirmative vote or ratification of a prehire contract. This is more than is permitted by the labor unions but still does not seem enough for the construction unions.

CONCLUSION

Again, ASA is strongly opposed to H.R. 281, the Construction Industry Contract Security Act of 1985. We believe it would have a catastrophic impact on both construction contractors and their employees.

We ask the members of the Subcommittee, the full Education and Labor Committee, and the Congress to give careful, thorough, objective and thoughtful consideration to this very significant piece of legislation. We hope that you will have the courage to exercise your best judgement, as your constituents expect.

ASA believes that if H.R. 281 is fairly considered on its merits with due and deliberate consideration and input from all sides, it will be recognized for what it truly is—a self-serving and shortsighted effort by the leaders of the construction unions, which will cause further economic instability of our country's largest industry.

Prepared Statement of Charles E. Hawkins III, CAE, Vice President, Government Affairs, Associated Builders and Contractors, Inc.

Associated Builders and Contractors is pleased to have the opportunity to testify in opposition to H.R. 281, the Construction Industry Labor Law Amendment of 1985 and in favor of free, open and fair competition in our industry. ABC is an association of 18,000 construction employers, contractors, subcontractors and supplies and the spokesman for the open shop construction industry.

ABC is, therefore, appreciative of this opportunity to counter the allegations made that courts and the National Labor Relations Board have not evenhandedly administered Federal labor law toward employer and union alike in the construction industry.

In enacting Section 8(f) of the NLRA in 1959, Congress recognized the unique characteristics of the construction industry and that it needed a different set of labor laws to govern it than those applying to non-construction employers. Section 8(f) was an attempt to harmonize the organizational interest of construction unions to gain recognition as bargaining representative of construction employees, with the right of employees to bargain collectively with representatives of their own choosing.

Construction unions are prinicpally upset with the U.S. Supreme Court's decision in *NLRB* v. *Local 103, Ironworkers, (Higdon Construction Company).*

In this case, the Supreme Court upheld an NLRB order declaring that the Ironworkers had violated the National Labor Relations Act by picketing for an unreasonable length of time to enforce a voidable prehire agreement without ever gaining support of a majority of the employees in the bargaining unit.

As stated by the Higdon Court, "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry. Section 8(f) was, of course, motivated by an awareness of the unique situation in that industry."

In upholding the NLRB ruling that unions must have the support of a majority of the eligible employees in a bargaining unit, before a prehire agreement will be enforceable, the Higdon Court stated that: "The Board's position is rooted in the generally prevailing statutory policy that a union should not purport to act as the collective agent for all unit employees, and may not be recognized as such, unless it is the voice of the majority of the employees in that unit.

"Section 7 of the Act guarantees employees the right to bargain collectively with representatives of their own choosing. Section 9(a) provides that the bargaining agent for the employees in the appropriate unit must be the representative designated or selected for the purposes of construction by the majority of the employees . . ."

The Court said that: "There could be no clearer abridgement of Section 7 of the Act, assuring employees the right to bargain collectively through representatives of their own choosing or to refrain from such activity than to grant exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority."

The Higdon Court then went on to explain correctly that: "Section 8(f) is an exception to this rule. The execution of an agreement with a minority union, an act normally an unfair practice by both employer and union, is legitimated by Section 8(f) when the employer is in the construction industry.

"The exception is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of the collective-bargaining contract does not apply to prehire agreements"; and that "the employer's duty to bargain and honor the prehire agreement is contingent upon the union attaining majority support at the various construction sites."

ABC agrees with the U.S. Supreme Court that this is an accurate interpretation of Congress' intent in enacting Section 8(f) in 1959, and that the basic premise underlying the National Labor Relations Act is that employees should be free to choose their own bargaining representatives.

It is hard to imagine how the Building Trades can seriously lobby Congress to eliminate the protections afforded employees by Section 8(f) in order to pursue their own narrow self interests.

In addition to being free of the normal legal restrictions of having to gain majority employee support before entering a labor agreement, Section 8(f) also allows unions and employers to include "union security clauses" in their prehire agreement which makes union membership mandatory for an employee within seven days of being hired.

Thus, a union can ensure majority status and the enforceability of a prehire agreement by merely policing the union security clause. In fact, the union business agent is not always anxious to gain majority status as bargaining representative by signing up "scabs" as union members.

This will only increase the number of workers who are eligible to be referred out of the hiring hall, which can in turn reduce the amount of work available to regular union members.

Rather, the business agent in many instances will allow the open shop contractor working under a prehire agreement to maintain his non-union work force. What the business agent is really looking for in this situation is not new members but the maintenance of union wages and standards and employer contributions to the unions's various trust funds.

Significantly, the Supreme Court in its last term decided in the Todd v. McNeff case that union pension trustees can enforce minority prehire agreements for past-due fringe benefit payments up until the time the employer repudiates it.

The construction unions here today would also like to see minority prehire agreements be ruled enforceable regardless of the employer's repudiation of the agreement and in spite of the lack of demonstrated interest by the union in having the employer's employees as members.

In other words, the unions would like to have their cake and eat it, too. We hope that this committee does not countenance that kind of inequity and unfairness.

In 1959, Congress carved out another major exemption to the National Labor Relations Act for construction employers and unions by lifting the normal prohibition against entering into "hot cargo" agreements. The construction industry proviso to Section 8(e) of the NLRA allows unions and employers to include "union-only" subcontracting of work to be performed at a construction job site as a provision in prehire contracts.

The U.S. Supreme Court on May 24, 1982, upheld the validity of "union-only" subcontracting clauses, even though, as the Court said: "Subcontracting clauses like those at issue here create "top-down" pressure for unionization requiring subcontractors, in order to obtain work, to force their employees to become union members—such pressure is implicit in the construction industry proviso and Congress thus decided to accept whatever top-down pressure such clauses might entail." *Woelke and Romero Framing, Inc.* v. *NLRB, et al.*

The top-down organizing impact of the union signatory subcontracting clause can best be demonstrated by using a hypothetical example: Union general contractor A has a subcontracting agreement with Union X limiting the subcontracting of work to employers with collective bargaining agreements with Union X.

General contractor A subcontracts part of a project to five separate non-union contractors. Prior to the start of the project, all five non-union contractors agree to sign collective bargaining agreements with Union X which also contain "union-only" subcontracting clauses.

Each one of these contractors is, in turn, engaged as the general contractor at various other construction sites. In order to protect the "community of interests" of these formerly non-union contractors, Union X demands that they remove all nonsignatory subcontractors from any projects they are involved in or face a breach of contract action for failing to live up to the "union only" subcontracting clause in their newly-signed collective bargaining agreements.

These nonsignatory subcontractors in turn sign labor agreements so as not to be removed from the job site. Thus, the seed of just one union signatory subcontracting agreement has given Union X a "windfall" organization gain.

In addition, informational picketing to protect area standard wages and working conditions often results in the union acquiring a labor contract from the open shop contractor. This technique of protecting local wages and working conditions is particularly effective on mixed jobsites where non-union and union contractors are both employed.

The union knows that all picket lines, even legal informational picket lines, inherently encourage union members on the mixed job site to engage in work stoppages or slowdowns in sympathy with the picketing union.

The open shop contractor, operating as a subcontractor on a mixed job site, is in turn aware of the impact a properly-conducted informational picket line has on his ability to stay on the job in the face of work stoppages.

The open shop contractor is, therefore, under tremendous pressure to placate the picketing union and other contractors by agreeing to sign a union contract. The advantage of informational picketing is that it is exempt from the restrictions imposed on recognitional picketing by the National Labor Relations Act.

Because a properly conducted informational picket line can be maintained indefinitely, it affords construction unions the weapon they need to achieve most of their legitimate labor goals. This is known as top-down organizing and it is the preferred method of organizing non-union construction employers.

Moreover, the construction unions exaggerate the alleged difficulties of organizing open shop contractors through the NLRB election process. Since open shop contractors do not rely on a hiring hall system of employment, they must of necessity maintain stable work forces that are no less accessible to union solicitation at work or in their homes than industrial or retail employees.

Member firms of this association have been successfully organized in the past by means of "bottom up" organizing by construction unions. "Bottom up" organizing means signing up employees through union authorization cards and petitioning the Board for an election.

Because our members maintain a steady work force and generally bid on construction work on a relatively small geographical area, their duty to bargain with the successful union continues to exist even if the job on which they were originally organized has ended.

In view of the broad "top-down" organizing weapon provided by Section 8(e), the construction union's bemoaning of the difficulties involved in gaining employer recognition through the NLRB election process rings hollow.

As a practical matter, construction unions will only use the NLRB election process as a last resort because of the relative ease with which employees can be signed up using top-down organizing techniques.

In the construction industry, it is not uncommon for the same enterprise to have two separate organizations, one to handle contracts performed under union conditions, and the other to handle those performed under non-union conditions. As to the unions' complaints that the NLRB gives scant protection to construction unions from the double-breasted construction employer, nothing could be farther from the truth.

The NLRB has imposed on construction employers a rigid set of rules for establishing and maintaining a double-breasted operation. If it is improperly established, the union firm could be held jointly liable, along with the non-union firm, for underpaid wages and delinquent payments to various labor trust funds. The union firm could also face a Board order merging the employees of the non-union firm into the original company's contract.

The principal factors, which the Board weighs in deciding whether sufficient integration exists, include the extent of interrelation of operations; centralized control of labor relations; common management; and common ownership or financial control.

Not one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors which go to show operational integration, particularly centralized control of labor relations.

Construction unions have successfully gained bargaining orders from the NLRB that extend to the employees of the non-union company when the double-breasted operation is not properly established or maintained.

The NLRB has found on numerous occasions that the non-union employer is the alter ego of the union signatory contractor, or that the union and non-union employer are a single employer for the purposes of the Act.

When the Board makes such a finding, the double-breasted veil is pierced and a bargaining order will issue against the offending employer for both companies, resulting in potentially staggering liability for back wages and fringe benefits owing to the union pension fund.

The National Labor Relations Board is not intentionally or unintentionally subverting the purposes and politics underlying the National Labor Relations Act to the detriment of construction unions. If there has been a gain in the numbers of non-union employees in the construction industry, I suggest that the labor movement look to its own work practice rules and inflationary wage scales as the root cause of declining union membership and not further besmirch the integrity of the NLRB.

Thank you.

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